No. 73

JOINT APPENDIX

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IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 13,027

ISBRANDTSEN COMPANY, INC., *Petitioner*,

v.

UNITED STATES OF AMERICA, AND FEDERAL MARITIME BOARD,
Respondents,

JAPAN-ATLANTIC-AND GULF FREIGHT CONFERENCE, ET AL.,
Respondent-Intervenors,

THE SECRETARY OF AGRICULTURE, *Petitioner-Intervenor*.

Petition for Review of Order of the Federal Maritime Board

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Petition for Review of Order of the Federal Maritime Board

JOINT APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

[Filed December 19, 1955]

Joseph W. Stewart, *Clerk*

ISBRANDTSEN COMPANY, INC.,
Petitioner,

v. No. 13027

UNITED STATES OF AMERICA, and
FEDERAL MARITIME BOARD,
Respondents.

Petition to Review

1. This petition is filed and the jurisdiction of this Court is invoked pursuant to the provisions of the Shipping Act of 1916, as amended, 46 U.S.C. 830, the Act of December 29, 1950, commonly known as the Hobbs Act, 5 U.S.C. 1031 et seq., and the Administrative Procedure Act of 1946, 5 U.S.C. 1009, to review, enjoin, set aside, annul and suspend the report, and approval therein, of the Federal Maritime Board (hereinafter sometimes referred to as the "Board"), dated December 12, 1955, served on the public December 14, 1955 (a copy of the Board report dated December 14, 1955, is attached hereto as Exhibit A). Said Board report and approval purport to authorize the Japan-Atlantic and Gulf Freight Conference (hereinafter sometimes referred to as the "Conference") to employ the so-called exclusive patronage contract dual rate system effective January 1, 1956, thereby permitting the Conference to coerce shippers in the trade to patronize conference steamship lines exclusively and to retaliate against those shippers in the trade who would patronize petitioner.

2. Petitioner, Isbrandtsen Company, Inc., is a "citizen of the United States" witkin the meaning of Section 2 of the Shipping Act 1916, as amended, 46 U.S.C. 802, operating

as a common carrier by water in the foreign commerce of the United States on various trade routes, particularly in the freight trade from Japan, Korea and Okinawa to United States North Atlantic Coast ports. Petitioner operates in the freight trade from Japan, Korea and Okinawa to the North Atlantic Coast of the United States as a part of its Eastbound Round-the-World Service, on a regularly scheduled basis, making a sailing every two weeks, using United States-flag vessels exclusively.

3. Petitioner is a corporation organized under the laws of the State of New York and is a resident of that State maintaining its principal office and place of business at 26 Broadway, New York 4, New York.

4. The United States of America is made a respondent herein pursuant to Section 1034 of Title 5 of the United States Code. The Federal Maritime Board is made a respondent pursuant to Rule 38(a) of this Court.

5. The Japan-Atlantic and Gulf Freight Conference is a voluntary association of seventeen common carrier steamship lines, with its principal office in Japan, which maintains an agent and has a place of business at 11 Broadway, New York, New York. The Conference is composed of twelve foreign-flag lines (eight of which are Japanese) and five United States-flag lines. Insofar as they are active in the trade, each conference line operates as a common carrir by water in the transportation of property between ports in Japan, Korea and Okinawa and ports on the Gulf and/or Atlantic Coasts of North America. Since the vessels of each member line of the Conference regularly call at United States ports for the loading and discharging of cargo, the conference lines are subject to the jurisdiction of the laws of the United States. Although nominally there are five United States-flag members of the Conference, two are virtually inactive in the trade having carried practically no cargo from Japan, Korea or Okinawa to United States Gulf or Atlantic Coast ports at least since 1949. Another

United States-flag line operates from Japan only to Gulf ports of the United States. One American-flag conference member does not even have voting privileges in the Conference.

6. Petitioner is the only independent, non-conference liner operation in this trade and has been since the end of the Second World War. Petitioner operates from Japan, Korea and Okinawa only to North Atlantic Coast ports of the United States competing directly for the cargoes which it carries with the twelve foreign-flag members of the Conference and with two United States-flag members who have actively engaged in this service to the North Atlantic Coast of the United States.

7. The Conference and member lines thereof purport to act in concert and to operate pursuant to a conference agreement, FMB No. 3103, first approved by a predecessor agency of the Federal Maritime Board in 1934. This basic agreement permits the establishment and fixing of uniform rates as between the conference lines, but it has never contained language specifically authorizing, or purporting to authorize, the use of the exclusive patronage contract rate system. Notwithstanding this lack of approval by the Board of its predecessors, the Conference employed the dual rate system illegally from 1928 to 1941 and was thereby able to eliminate or suppress any independent or non-conference competition.

8. Contrary to the specific provisions of Sections 14, 15, 16 and 17 of the Shipping Act of 1916, as amended, 46 U.S.C. 812, 814, 815, 816, prohibiting, among other things, "deferred rebates", "fighting ships", retaliatory, discriminatory or unfair practices, or practices detrimental to the Commerce of the United States, the Board's report of December 12, 1955, purports to authorize the institution of an exclusive patronage contract rate system by the Conference, effective January 1, 1956, whereunder the Conference would maintain two levels of rates, viz., the "contract

rates" and the higher "non-contract rates," the sole consideration for the enjoyment of the lower contract rates being the agreement of the shipper to patronize the conference lines exclusively, and the sole reason for the exaction of the higher contract rates being the refusal of the non-contract shippers to sign exclusive patronage contracts with the Conference. The non-contract rates as proposed by the Conference, and as approved by the Board, would be arbitrarily fixed at a level 9½ per cent higher than the contract rates. Although the Conference has not determined what rates it would establish under the exclusive patronage system, and, therefore, the Board had no specific rates before it in approving the system, both the contract rates and the non-contract rates would be charged for precisely the same transportation service, there being no difference in cost or value, or in any other respect, between the service offered contract shippers and that offered non-contract shippers. In order further to coerce the shippers and to effectuate a complete and permanent monopoly in the trade, the exclusive patronage contract, as approved by the Board, provides that in the event that a contract shipper should patronize a non-conference vessel operating in the trade, the shipper would become liable to a penalty of 50 per cent of the freight which he would have paid at conference contract rates had the shipment moved on a conference line. This entire system is intended to crush and eliminate the independent competition of petitioner, thereby allowing the Conference to enjoy a complete and perpetual monopoly in the trade and to charge such rates as the conference lines may wish.

9. The economic coercion of the Conference is further aided by the fact that the conference lines collectively furnish over 300 sailings a year as compared with only 26 sailings yearly by petitioner. Many shippers in the trade require eight or more sailings each month. Certain conference lines also furnish certain special facilities, such as refrigerated space and silk rooms, which Isbrandtsen does

not provide. Furthermore, Isbrandtsen does not serve certain ports, such as Gulf ports, which the conference lines serve. Shippers who would have to rely on Conference vessels for part of their service would be economically coerced into signing exclusive patronage contracts with the Conference and would be prevented from patronizing or using the service of petitioner.

10. The background of the administrative proceedings as to which review is sought is as follows:

a. The proceedings were started by the Conference filing under General Order 76, Rule 236, of the Federal Maritime Board, notice of the filing of which rule was given in the *Federal Register* of December 31, 1952. (A copy of Rule 236 of the Board's General Order 76 is hereto attached as Exhibit B.) Rule 236 of the Board's General Order 76 pertains to the employment of the exclusive patronage system by steamship conferences, often called shipping cartels, operating in the foreign commerce of the United States, which conferences can only lawfully exist when their concerted activities have been approved by the Board pursuant to Section 15 of the Shipping Act of 1916, as amended, 46 U.S.C. 814. (Copies of the pertinent sections of the Shipping Act, Sections 14, 15, 16 and 17 are hereto attached as Exhibit C.) The Conference filing under General Order 76 did not constitute, as the Conference admits, notice of any precise agreement between conference lines, but only the intention to institute an exclusive patronage system. This filing also contained an exclusive patronage contract which would be entered into between conference lines and shippers. (A copy of this exclusive patronage contract is attached hereto as Exhibit D.)

b. Of the about one hundred seventeen steamship freight conferences organized pursuant to Section 15 of the Shipping Act, and subject to the jurisdiction of the Board, about sixty-two conferences presently employ that system, through so-called exclusive patronage agreements or mer-

chants' rate agreements, under which a signing shipper obligates himself to transport all of his goods exclusively on the steamship lines which are members of the particular Conference and not to deal with any line which does not belong to the Conference, under severe penalties if he should violate said agreement. In sole consideration of the contract shipper's agreement of exclusive patronage to conference member lines, the "contract" shipper is charged a freight rate which is arbitrarily less by a fixed percentage or dollar amount than the rate charged the non-signing shipper. Such a difference in rates is called by the Conference a spread or differential.

c. In this trade—and in others—petitioner is not a member of the Conference, and is, in fact, in this trade—and some others—the only independent non-conference operator. In petitioner's operations around the world it is the largest American independent line.

d. In 1948, petitioner brought an action before a statutory court in the Southern District of New York to test the legality of the exclusive patronage contract rate system. After that court had issued injunctions against the use of the system in the North Atlantic trade, the proceeding reverted to the then United States Maritime Commission for the exercise of its primary jurisdiction. On appeal to the court by petitioner and the United States Department of Justice, from the order of the Commission which would have allowed the system to go into effect in that trade it was set aside by the statutory court, which decision was affirmed by the United States Supreme Court, by an equally divided court.

e. Since 1948 Isbrandtsen has been at all times ready and willing to have the basic issue of legality of the exclusive patronage system determined by the Courts and has been willing to reduce a stipulation of the issues to a few elemental and admitted facts. Because of the insistence of the Board, and its predecessors, that jurisdiction be exer-

cised in each case that arose, as in this particular proceeding, petitioner has been prevented, to this time, from obtaining a clear-cut court determination of the issue. It is this determination that petitioner now seeks. The same position has been taken over the years by the United States Departments of Justice and Agriculture.

f. Admittedly, as a result of the holding of District Court in 1951 concerning the attempted employment of the system in the North Atlantic trade, the Board promulgated its General Order 76, which in substance requires any conference which proposes to initiate such a system, to first file with the Board a statement setting forth the particulars as to the amount of the spread, the date when the system is to go into effect, the reasons for the use of the system in the particular trade, together with the filings of any contracts to be entered into by the conference or its member lines and shippers. Said General Order does not and has never required a statement of the nature or scope of the agreement between the conference lines.

g. The instant proceeding arises directly from such a filing on December 4, 1952, by the Japan-Atlantic and Gulf Freight Conference, proposing to initiate the exclusive patronage system in the conference trade effective on the thirtieth (30th) day following the filing. Protests against the proposed system were filed by petitioner and the Department of Justice, and subsequently by the Department of Agriculture. The summary of administrative proceedings and actions and the brief details of the appeals by petitioner and the Department of Justice to this Court, together with a statement of the Court orders are set forth on pages 2 and 3 of the Board's mimeographed report as follows:

"As required by General Order 76, the conference statement set forth (a) the amount of differential or spread between the proposed contract and non-contract rates, (b) the effective date of the proposed system, (c) the reasons for the use of dual rates in the trade involved, (d) the basis

or the differential or spread, and (e) copies of the form of contract proposed to be used.

"In its protests of January 12, 1953 to the conference statement, Isbrandtsen requested that we (1) grant a hearing on the lawfulness of the proposed dual rate system under sections 14, 15, 16 and 17 of the Shipping Act, 1916 (the act); (2) direct the conference not to effectuate the proposed dual rate system pending completion of the hearing, and alternatively (3) reject the conference statement, without a hearing, for non-compliance with General Order 76. In its supplemental and amendatory comments of January 19, 1953, Isbrandtsen argued that (1) it would be unlawful, under section 15 of the act, for the conference to initiate a dual rate system without prior Board approval and (2) the Board is without authority to approve the dual rate system proposed by the conference since the system would be unjustly discriminatory and unfair as between carriers, shippers, exporters and importers, would operate to the detriment of the commerce of the United States, and would be in violation of the act. The protest of Justice was substantially similar to the Isbrandtsen protest, as amended.

"On January 21, 1953 we granted a hearing on the protests, but denied the requests to suspend the operation of the dual rate system, stating that (1) the conference statement appeared to comply with the requisites of General Order 76, (2) the proposed differential between contract and non-contract rates did not appear to be arbitrary, unreasonable, or unjustly discriminatory; (3) it did not appear that the initiation of the proposed dual rate system would be unjustly discriminatory or unfair or detrimental to the commerce of the United States or in violation of the act; and (4) it did not appear that the initiation of the system would cause irreparable injury to Isbrandtsen.

"On January 22, 1953, Isbrandtsen filed in the U. S. Court of Appeals for the District of Columbia Circuit a petition for review of our January 21 order. That court, on the same day, granted a temporary stay of the order until such time as Isbrandtsen's application for an interlocutory injunction could be heard. On March 23, an interlocutory injunction was granted, staying so much of our January 21 order as purported to approve institution of the dual rate system. Petitions for certiorari, filed by us and by the conference, were denied by the Supreme Court.

"On January 21, 1954, the Court of Appeals set aside so much of the January 31, 1953 order as purported to approve the proposed dual rate system, holding that section 15 of the act requires our approval before a dual rate system may be effectuated and enjoined the conference from effectuating the system prior to such approval.

"On August 17, 1953, we granted the petition of the Department of Agriculture for leave to intervene in this proceeding. Thereafter, hearings were conducted before an examiner during the period October 5 through December 23, 1953." [Footnotes omitted.]

h. The Report of the Board dated December 12, 1955, but not served on the public until December 14, 1955 (a copy of which is attached hereto as Exhibit A), purports to approve the use of the exclusive patronage contract systems by the Conference, subject to the Conference, unilaterally making certain major modifications in the exclusive patronage contract, despite the fact that the Conference never submitted, nor did General Order 76 ever require or provide for, the filing of the specific agreement which might be involved between the conference lines. It is furthermore decided in said report that the system should be allowed to go into effect on January 1, 1956, without stating, despite a difference in time of over one and one-half days between Washington and Japan, whether this time is to be computed in Washington, Japan, or elsewhere.

11. The Board's report of December 12, 1955, contains several erroneous conclusions of law, without which the Board's decision could not possibly be supported. Many constitutive, pivotal, or basic findings of fact in such report are not based "upon consideration of the whole record" nor are they in any way "supported by and in accordance with the reliable, probative, and substantial evidence," as required by Section 7 of the Administrative Procedure Act, 5 U.S.C. 1009. Many of the Board's findings, moreover, are inconsistent with other findings and inconsistent with the Board's ultimate conclusions. Without limiting the scope of this petition in any way or the scope of review sought,

which is a review of the entire record before the Board, the following findings of the Board are cited for illustration:

a. The Board on page 6 of its mimeographed report points out that there never has been any language in the conference agreement "specifically authorizing the use of the dual rate system," but that the Conference from 1928 through 1941—in violation of law—did employ this system without approval. The Board further finds, on the same page, that by employing the dual rate system before the war the Conference was able to suppress and eliminate direct liner competition.

b. The Board finds on pages 6 and 7 of its mimeographed report that:

"Since the resumption of private steamship operation after World War II, Isbrandtsen has been the sole non-conference line which has maintain (sic) a berth service in the Japan Atlantic trade."

c. The Board finds on page 11 of its mimeographed report that prior to March 12, 1953 [when the conference started a rate war]:

"Various shippers have considered the general level of conference rate to have been too high, . . ."

The Board further found on the same page that:

"Additionally, shipprs testified to a lack of success until subsequent to March 1953, in their efforts to convince the conference to reduce the level of rates on various commodities."

d. The facts concerning the refusal of the Conference to meet competition in the usual American way and its deliberate attempt to eliminate petitioner's competition by starting a rate war, in flagrant disregard of the interests of shippers, are set forth in findings appearing on pages 11 and 12 of the Board's mimeographed report as follows:

"At a special meeting of March 9, 1953, the conference discussed steps might be taken to meet Isbrandtsen's competition and resolved to call a special meeting to pass on a

proposal to grant a 20 percent discount on all tariff rate items as a method of meeting non-conference competition and minimizing rumored rebating among the member lines. At a special meeting of March 12, 1955, however, the proposal was rejected and, instead, the conference voted to open conference tariff rates on ten of the major commodities moving in the trade. At various subsequent times the conference has voted to open rates on most of the commodities that move in substantial volume in the trade, with the exception of refrigerated cargo. *No advance notice of the initial or subsequent opening of rates was given to interested shippers, and no minimum rates were established on any of the open rated commodities.* The decision to open rates was made 'in view of the action taken previously by the Trans-Pacific Freight Conference of Japan.' The Conference secretary testified that the conference would have lost cargo for points in inland United States to the Trans-Pacific Freight Conference of Japan had this action not been taken. Like the rejected proposal to reduce rates by 20 percent, the opening of rates was directed at non-conference competition and the rumored rebating by member lines. *In addition, it was hoped that the rate war would lead to Isbrandtsen's joining the conference* or to the institution of the dual rate system or other system.

"After March 12, 1953, the level of rates charged dropped, first, to about 80 percent, and later to about 30 percent to 40 percent of the pre-March 12 level. On a fairly large number of items, some lines have charged rates as low as $6.00-$6.50 per ton, while handling costs alone in this trade are approximately $8.50 per ton." [Emphasis added.]

e. The Board finds on pages 12 and 13 of its mimeographed report that petitioner soon after the rate war started attempted to apply minimum compensatory rates below which it would not carry cargo. The Board further finds that since May 1953, when petitioner's minimum rates were established it "has carried little cargo in the trade." The Board also found that the Conference refused Isbrandtsen's public and unequivocal offer "to apply reasonable rates which might be set by the Conference."

f. The Board finds on page 13 of its report that the rate war instituted by the Conference has been detrimental to

ne interests of shippers and detrimental to the commerce f the United States as follows:

"Many Japanese shippers have requested the conference o close rates and to end the rate war. The resultant insta- ility has affected the smooth flow of commerce between apan and the United States; has raised a threat that ustoms duties in the United States might be increased; as affected the value of inventories of Japanese goods in he United States; has caused requests for postponement f shipments by F.O.B. buyers in the United States, since uch buyers assume the risk of fluctuating freight rates. rices for the sale of Japanese goods are often fixed by he importers in the United States as much as six months n advance of their arrival in the United States."

The Board found, further, that the rate war, instituted on March 12, 1953, has resulted in United States-flag lines carrying little or no cargo in the trade—at least up to the ime of the hearing. Despite these deleterious results which ollowed from the Conference's display of power in an ttempt to force the hand of the Board, the Board has llowed the Rate War to continue from March 12, 1953 to he present, without taking any action whatsoever. The Board admits that it had at all times the power, and, indeed, he sanction to end the rate war by methods short of the stablishment of a monopoly, as now recommended in its report of December 2, 1955, for the Board states on page 46 of its mimeographed report that:

"In any event this Board has full power over those rates of conference carriers in foreign commerce which are detri- mental to the commerce of the United States."

g. The Board finds on pages 14 and 15 of its mimeo- graphed report that the 9½ per cent differential between contract and non-contract rates was arbitrarily established, it being the differential the Conference considered itself limited to under Japanese law.

h. The Board finds, on page 16 of its mimeographed re- port, that many shippers would be effectively coerced into

signing exclusive patronage contracts because of Isbrandtsen's infrequency of service, its lack of reefer space and special silk rooms, and by the fact that Isbrandtsen's vessels serve only North Atlantic ports and not the Gulf ports, as well as not serving several other ports served by the Conference. In this respect, the Board states on page 16 as follows:

"Isbrandtsen's carryings, if a dual rate system were put into effect in this trade, would be limited by the lack of reefer space and special silkrooms on Isbrandtsen vessels and by the limited frequency and range of service of those vessels. Shippers of dry cargo destined for Gulf ports, shippers of reefer cargo, and shippers requiring more than two sailings per month would, practically, have no choice between the conference and Isbrandtsen's service as presently constituted."

i. The Board finds further on page 16 of its mimeographed report that:

"There would, under the dual rate system, be no difference in the cost or value of service rendered to two shippers, one of which is a contract signatory and the other of which is not a contract signatory, although the cargoes of each might be identical and identically destined." [Emphasis supplied.]

j. The Board's findings on pages 17 and 18 of its mimeographed report leave no doubt that shippers were generally unfamiliar with the exclusive patronage contract approved by the Board and had no voice in drafting its provisions. The Board finds on pages 17 and 18 as follows:

"Most shippers appearing in this proceeding were not familiar with the terms of the proposed contract. One shipper was under the impression that the terms of the contract had not yet been definitely arrived at and, like the rates, were to be the subject of discussions between the shippers and the conference. Subsequently, a large shipper organization submitted proposed contract amendments to the conference, including recommendations that (1) the volume of obligated cargo should be no less than 85 percent of the shipper's total cargo moving in the trade;

2) an f.o.b. or f.a.s. shipment cannot move under contract ates unless the Japanese shipper is authorized to route he shipment or unless the f.o.b., f.a.s. buyer is signatory o a dual rate contract; (3) rate increases should not be ffected until the termination of the calendar month in hich notice of increase is given and of the three succeeding alendar months; (4) if the carriers do not furnish service n request, the shipper may (a) ship via non-conference ine if not notified by the secretary of space aboard a con- erence vessel within the period of time *designated by the hipper* and (b) recover from the conference, as liquidated lamages the excess of freight, above conference rates, ctually paid for shipment; (5) liquidated damages for reach of agreement by the shipper should be 20 percent f the freight which the shipper would have paid had the hipment moved via conference vessel; and (6) the carriers nd the shippers should appoint a special committee, com- osed of representatives of each, for the purpose of dis- ussing amendments to the agreement and reasonable levels f freight rates."

The above-mentioned witnesses, moreover, were the shipper witnesses of the Conference and in no respect are to be considered typical of the over-all shipper attitude with respect to employment of the dual rate system by the Con- ference. The facts of record are undisputed that many shippers oppose the use of the system.

k. The Board states on page 38 of its report that:

"We consider dual rate contracts to be, in nature, highly analogous to volume discounts; although a shipper does not promise to ship a specific amount of cargo, the expres- sion of his obligation in terms of percentages gives the conference lines as great an assurance of a basic core of cargo on which to rely in planning future vessel require- ments as that which would result from a promise to ship a specific amount of cargo within a given period."

The above conclusion is legally erroneous and, furthermore, it is contrary to the facts of record. It is incomprehensible what the phrase "in terms of percentages" may mean, for there is nothing about it in the record.

1. The Board avoids any finding on the irreparable injury that will be caused to petitioner or whether petitioner could possibly continue as an independent carrier in the trade, in view of the monopolistic weapons handed to the Conference by the Board. The Board, however, in an inconsistent finding or conclusion on page 46 of its report states as follows concerning the desirability of petitioner continuing as an independent carrier:

"While Isbrandtsen's share of the traffic may, as stated, be reduced, we do not anticipate that such increase in conference controlled traffic will result in the traditional evils associated with monopoly. *The continued participation of Isbrandtsen in the trade, as well as the existence of strong shipper organizations, stand as a strong deterrent against exorbitant freight rates and other objectionable monopolistic practices.*" [Emphasis added.]

m. The Board admits on page 50 of its mimeographed report that there was nothing before it to approve except the Conference's amorphous and inchoate filing under the Board's General Order 76 and the proposed exclusive patronage contract, which is between the Conference lines and shippers and could not in any event be approved under Section 15 of the Shipping Act and entitled to any immunity from the Anti-Trust Laws. The filing of the Conference under General Order 76 does not contain any clearly stated "agreement" or "understanding" between the carriers involved and, accordingly, it is impossible to determine the scope of the agreement approved by the Board. As the Board itself found on page 50 of its mimeographed report:

"The conference has not considered its General Order 76 filing as a filing for approval under section 15 of the Act."

Under these circumstances, it is clear that there was never any effective filing of an exclusive patronage contract agreement between the conference carriers to the Board. Under the Administrative Procedure Act, opponents or prot-

estants of such an agreement certainly have the right to know at least at the hearing what is being presented to the Board for approval. Under these circumstances, since the Board does not state what agreement it has approved, its "approval" is a futile and meaningless act and cannot be allowed to have any legal effect.

12. Petitioner would be irreparably and permanently injured and damaged if the Conference should be allowed to institute its exclusive patronage contract system. Because of the admitted economic coercion the Conference would be able to impose upon shippers in the trade, petitioner would lose many of its regular customers, would be deprived of the markets it has created over the years through its own efforts and at large expense, and would not even have the opportunity of soliciting or approaching shippers in the trade for their business. The fundamental right afforded by our laws under the American system of free enterprise, namely, access to customers and the opportunity to do business, would be denied to your petitioner.

Wherefore petitioner prays that this Court:

A. Enjoin, set aside, annul, and suspend the report of the Federal Maritime Board, dated December 12, 1955, and any order or approval issued therein.

B. Enter an interlocutory injunction suspending and restraining the enforcement, operation, and execution of the Board's report insofar as it would allow the Japan-Atlantic and Gulf Freight Conference to employ in any manner whatsoever the exclusive patronage contract rate system.

C. Enter a temporary stay and suspension of the operation or execution of said Board report and any order of the Board pending the hearing on the application for such interlocutory injunction.

D. Adjudge, order, and decree that the Board's report and approval purporting to authorize the use of the exclusive patronage contract rate system by the Conference is, and at all times was, beyond the legal authority of the Board, in violation of the legal rights of petitioner, and wholly void and of no legal force and effect, and that such report and approval be perpetually vacated, set aside, and annulled, and the operation and execution thereof be perpetually and permanently restrained and enjoined.

E. Permanently enjoin and restrain the Conference from coercing shippers in the trade to use conference line vessels or otherwise interfering with petitioner's right to do business and have free access to its shipper customers.

F. Grant such other and further relief as the Court may deem just and proper in the premises.

/s/ JOHN J. O'CONNOR
Attorney for Petitioner
Isbrandtsen Company, Inc.
Washington Building
Washington 5, D. C.

Dated: Washington, D. C.
December 19, 1955

Report of Federal Maritime Board

(Served December 14, 1955)
(Federal Maritime Board)

No. 730

THE MATTER OF THE STATEMENT OF JAPAN-ATLANTIC AND ULF FREIGHT CONFERENCE FILED UNDER GENERAL ORDER 76

roposed exclusive patronage contract/non-contract system of the Japan-Atlantic and Gulf Freight Conference approved under section 15 of the Shipping Act, 1916.

he exclusive patronage contract/non-contract system of the Japan-Atlantic and Gulf Freight Conference not found to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States or to be in violation of the Shipping Act, 1916.

pproval granted under section 15 of the Shipping Act, 1916, contingent upon modification of the proposed exclusive patronage contract to reflect the views of the Board.

Herman Goldman, Elkan Turk, Seymour H. Kligler and *lkan Turk, Jr.*, for Japan-Atlantic and Gulf Freight Conference, respondent.

John J. O'Connor and *John J. O'Connor, Jr.* for Isbrandtsen Co., Inc., petitioner.

Edward P. Hodges, James E. Kilday, William J. Hickey nd *Frank J. Oberg* for the Department of Justice, petitioner.

Chas. B. Bowling, Chas. D. Turner, Charles W. Bucy, larry Ross, Jr., and *Henry A. Cockrum* for United States Department of Agriculture, intervener.

Max E. Halpern, John Mason, Edward Aptaker, and *Richard W. Kurrus* as Public Counsel.

REPORT OF THE BOARD

By the Board:

This proceeding arose out of a statement filed on December 24, 1952, by the Japan-Atlantic and Gulf Freight Con-

ference (the conference) pursuant to section 236.3 of General Order 76[1] proposing to initiate an exclusive patronage contract/non-contract freight rate system (dual rate system) in the trade from Japan, Korea, and Okinawa to United States Gulf ports and Atlantic Coast ports of North America, the system to become effective on the 30th day following the filing. Protests against the proposed system have been filed by Isbrandtsen Company, Inc. (Isbrandtsen), an independent steamship company operating in the Japan-Atlantic trade, and by the Department of Justice (Justice).

Under the proposed dual rate system, contract rates set at a level below non-contract rates, would be charged, on all commodities moving in the trade, to those shippers promising to ship exclusively via conference vessels during the period of the contract. A second and higher level of rates would be charged non-singing shippers. The differential or spread between the levels of contract and non-contract rates was fixed in the statement at 9½ percent of the contract rates applicable to the respective tariff items, rounded off to the nearest quarter of a dollar.

As required by General Order 76, the conference statement set forth (a) the amount of differential or spread between the proposed contract and non-contract rates, (b) the effective date of the proposed system, (c) the reasons for the use of dual rates in the trade involved, (d) the basis for the differential or spread, and (e) copies of the form of contract proposed to be used.

In its protests of January 12, 1953 to the conference statement, Isbrandtsen requested that we (1) grant a hearing on the lawfulness of the proposed dual rate system under sections 14, 15, 16 and 17 of the Shipping Act, 1916 (the act); (2) direct the conference not to effectuate the proposed dual rate system pending completion of the hearing,

[1] 17 F.R. 10175.46 C.F.R. 236.3 (Nov. 10, 1952).

nd alternatively (3) reject the conference statement, without a hearing, for non-compliance with General Order 76. n its supplemental and amendatory comments of January 9, 1953, Isbrandtsen argued that (1) it would be unlawful, nder section 15 of the act, for the conference to initiate dual rate system without prior Board approval and (2) he Board is without authority to approve the dual rate ystem proposed by the conference since the system would e unjustly discriminatory and unfair as between carriers, hippers, exporters and importers, would operate to the letriment of the commerce of the United States, and would e in violation of the act. The protest of Justice was substantially similar to the Isbrandtsen protest, as amended.

On January 21, 1953 we granted a hearing on the protests, ut denied the requests to suspend the operation of the ual rate system, stating that (1) the conference statement appeared to comply with the requisites of General Order 76, (2) the proposed differential between contract nd non-contract rates did not appear to be arbitrary, nreasonable, or unjustly discriminatory; (3) it did not ppear that the initiation of the proposed dual rate system would be unjustly discriminatory or unfair or detrimental o the commerce of the United States or in violation of he act; and (4) it did not appear that the initiation of the system would cause irreparable injury to Isbrandtsen.

On January 22, 1953, Isbrandtsen filed in the U. S. Court of Appeals for the District of Columbia Circuit a petition for review of our January 21 order. That court, on the same day, granted a temporary stay of the order until such time as Isbrandtsen's application for an interlocutory injunction could be heard. On March 23, an interlocutory injunction was granted, staying so much of our January 21 order as purported to approve institution of the dual rate system. Petitions for certiorari, filed by us and by the conference, were denied by the Supreme Court.[2]

[2] *F.M.B. et al.* v. *Isbrandtsen Co., Inc.*, 345 U.S. 975 (1953).

On January 21, 1954, the Court of Appeals set aside so much of the January 21, 1953 order as purported to approve the proposed dual rate system, holding that section 15 of the act requires our approval before a dual rate system may be effectuated and enjoined the conference from effectuating the system prior to such approval.[3]

On August 17, 1953, we granted the petition of the Department of Agriculture for leave to intervene in this proceeding. Thereafter, hearings were conducted before an examiner during the period October 5 through December 23, 1953.

In recommended decision dated September 13, 1954, the examiner found that (1) the conference statement complied with the requirements of General Order 76; (2) the differential between contract and non-contract rates would not be arbitrary, unreasonable, or unjustly discriminatory; (3) the initiation of the proposed dual rate system would not be unjustly discriminatory, unduly prejudicial or unfair or detrimental to the commerce of the United States; and (4) the proposed dual rate system would not cause irreparable injury to Isbrandtsen. On motion of Isbrandtsen, Justice and Public Counsel, we, by order dated October 6, 1954, remanded the record to the examiner with instructions to prepare supplemental findings of fact as to the basis for the spread between contract and non-contract rates and as to the reasonableness of the exclusive patronage contracts proposed for use in the trade, and with instructions to show the ruling upon the findings of fact and conclusions of law proposed by the parties.

On January 17, 1955, the examiner served his supplemental findings on those matters specified in the order of remand. Exceptions to the recommended decision, as supplemented, were filed by all parties to the proceeding and oral argument on the exceptions has been heard. Exceptions and proposed findings not discussed in this report

[3] *Isbrandtsen Co., Inc.* v. *United States et al.*, 211 F. 2d 51 (1945).

nor reflected in our findings have been considered and found not justified by the facts or not related to material issues in this proceeding. Recommended findings and conclusions of the examiner are not adopted herein unless so specified.

We find the following to be the basic evidentiary facts:

Basic Facts

The conference is a voluntary association of seventeen steamship lines[4] operating under authority of Agreement FMB No. 3103 as amended, between Japan, Korea, and Okinawa, and the Gulf and Atlantic Coasts of North America.

Members of the Conference and its predecessor organization, the Japan-Atlantic Coast Freight Conference, have operated as common carriers in the trade from Japan to the Atlantic Coast of North America under successive agreements, the first of which was an agreement between two Japanese and one U. S. Flag line, executed on November 14, 1922 and finally approved by our predecessor, the Shipping Board, on February 16, 1926, as Agreement No. 73-1. A succeeding agreement, No. 129, was amended to include Gulf ports as discharging ports. All subsequent agreements have included both Gulf and Atlantic ports.

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[4] The present membership of the conference is as follows:
a. Mitsui Steamship Co., Ltd.
b. Kawasaki Kisen Kaisha
c. Kokusai Line
d. Nippon Yusen Kaisha
e. Osaka Shosen Kaisha, Ltd.
f. Shinnihon Steamship Co., Ltd.
g. Barber-Wilhelmsen Lines *
h. American President Lines, Ltd.
i. A. P. Moller, Maersk Line *
j. Yamashita Kisen Kaisha
k. Waterman Steamship Corporation
l. Lykes Bros. Steamship Co., Inc.
m. United States Lines Company (American Pioneer Line)
n. States Marine Corporation and States Marine Corporation of Delaware
o. Ivaran Lines—Far East Service *
p. De La Rama Lines *
q. Daido Kaiun Kaisha

* Represents a joint service the membership of each of which consists of two or more ship owning corporations (R. 33, Exhibits 22, 60, 70, and 71).

The current agreement, FMB No. 3103, approved in unamended form on June 25, 1934, was executed by eight lines, one American, five Japanese, and two others, all parties to the agreement[5] at the time of hearing herein.

Private steamship operations in the conference trade ceased on or about December 8, 1941 due to the outbreak of war between Japan and the United States; private steamship lines commenced operations on or about March 2, 1946, carrying cargoes for Supreme Commander for the Allied Powers (SCAP) under rates set by War Shipping Administration. Licenses were issued by SCAP to private steamship companies commencing on November 1, 1947. Private exporting by Japanese merchants was not resumed until the latter part of 1948 or early 1949. The conference continued to exist, at least nominally, during the Second World War, with American President Lines, Ltd., Barber-Wilhelmsen Line, and A. P. Moller, Maersk Line as members. The conference was formally reestablished in Japan on December 13, 1948. Of the ten lines constituting the conference membership in 1948, three were conference members in 1934 when the present agreement was approved, in unamended form, by our predecessor, the Shipping Board.

While Agreement No. 3103, as amended (hereinafter the basic agreement) permits the establishment, regulation, and maintenance of agreed rates, it contains no language specifically authorizing the use of the dual rate system. The conference, however, from 1928 through 1941, employed a dual rate system for various commodities. The system in 1928 covered only three commodities but was extended in 1934 in Tariff No. 10 to cover all important commodities moving in the trade. In pre-war tariffs the differential was set on a dollar rather than percentage basis and varied from commodity to commodity and from tariff to tariff. Expressed in percentages, the pre-war differentials between contract

[5] Dollar S.S. Lines, Inc., Ltd., has been succeeded by American President Lines, Ltd. The present member, Nippon Yusen Kaisha, was in 1934 represented by itself and its Kobe Branch.

and non-contract rates ranged from 12% to 66⅔% of the contract rates.

Prior to World War II, due at least in part to the existence of the dual rate system, the conference had no direct liner competition and little tramp competition. Commodities normally moving in this trade are not conducive to tramp movement.

Since the resumption of private steamship operation after World War II, Isbrandtsen has been the sole non-conference line which has maintained a berth service in the Japan-Atlantic trade. From 1947 to early 1949, Isbrandtsen operated from Japan to Atlantic Coast ports of the United States via the Suez Canal. Since early 1949 Isbrandtsen has operated an approximately fortnightly service from Japan to U. S. Atlantic Coast ports via the Panama Canal as part of its Eastbound, Round-the-World service.[6] Although Isbrandtsen chartered three foreign-flag vessels for single sailings in this trade in 1950 and 1951, it has otherwise exclusively employed its eleven United States-flag vessels in this trade. In other trades, Isbrandtsen employs both U. S.-flag and foreign-flag vessels. None of Isbrandtsen's vessels are equipped with refrigerated space or special silkrooms as are many of the conference vessels.

Conference membership is open to any common carrier regularly operating or intending regularly to operate in the trade. Isbrandtsen has remained outside the conference as a matter of policy, although invited to join.

Most of the conference vessels commence loading inbound cargo for the United States at the Philippines, proceed to Hong Kong and complete loading in Japan. Most of the conference vessels discharge at Pacific, Gulf and Atlantic

[6] Isbrandtsen's vessels in the Round-the-World service proceed from United States North Atlantic ports to Mediterranean ports and through the Suez Canal to Bombay, Colombo, Singapore, Manila, Hong Kong, Keelung, Kobe, Nagoya, Shimizu, Yokohama, San Francisco, Los Angeles, and return via the Panama Canal to United States North Atlantic ports.

ports of the United States.[7] The amount of cargo moving from Japan to Gulf ports of the United States has been small in comparison with the amount of such cargo moving to ports on the Atlantic Coast of the United States. While Isbrandtsen sometimes loads inbound cargo for the United States in India, Ceylon, and Singapore, such carryings are minor. Its principal inbound United States carryings, aside from cargo from Japan in this trade and in the Japan-United States Pacific Coast trade, have been cargoes lifted in the Philippines. Cargo from Hong Kong and Japan is carried largely on a measurement basis[8] and moves under higher freight rates than the primarily weight and bulk cargo originating in the Philippines. Ideally, on a vessel of 10,000 dwt capacity, owners prefer to carry about 3,000 tons of weight cargo and to devote the remainder of the vessel's dwt capacity, exclusive of capacity required for fuel, water, and stores to the higher paying measurement cargo. In allocating space as between Japanese and Philippine cargo, the higher rated Japanese cargo is given priority.

The comparative sailings and carryings of Isbrandtsen and the conference lines in the Japan-Atlantic and Gulf trade from 1949 through July 1953 are indicated in the following table:

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[7] Lykes serves U. S. Gulf ports only; from 1949 to the close of hearings in this proceeding States Marine vessels returned to the United States in ballast. American President Lines operates from Japan to Atlantic Coast ports of the United States via the Suez Canal as a part of its Westbound, Round-the-World Service.

[8] Japanese measurement cargo stows about three measurement tons to one deadweight ton.

TABLE I

Calendar Year	Number of Sailings: Isbrandtsen	Conf.	Total	Cargo Carried (Revenue Tons): Isbrandtsen	Conf.	Total	Average Carryings Per Sailings: Isbrandtsen	Conf.	Percentage of Total Liner Cargo: Isbrandtsen	Conf.
1949	6	103	109	13,099	135,635	153,734	3,016	1,317	12	88
1950	21	137	158	120,381	229,829	350,210	5,780	1,678	34	66
1951	21	174	195	93,450	219,343	312,793	4,450	1,261	30	70
1952	24	221	245	98,834	281,308	380,142	4,118	1,273	26	74
1953 6 mos.	12	153	165	37,308	189,503	226,811	3,109	1,239	16	84

The comparative sailings and carryings of Isbrandtsen and the conference lines from the Philippines to Atlantic and Gulf ports are indicated in the following table:

TABLE II

Calendar Year	Number of Sailings: Isbrandtsen	Conf.	Total	Cargo Carried (Revenue Tons): Isbrandtsen	Conf.	Total	Average Carryings Per Sailings: Isbrandtsen	Conf.	Percentage of Total Liner Cargo: Isbrandtsen	Conf.
1949	9	79	88	8,977	262,435	271,412	997	3,322	3	97
1950	20	107	127	4,548	491,405	495,953	227	4,593	1	99
1951	16	126	142	11,416	485,271	496,687	714	3,851	2	98
1952	20	193	213	20,148	907,065	927,203	1,007	4,700	2	98
1953	12	127	139	21,564	573,774	595,338	1,797	4,518	4	96

The total carryings in revenue tons of Isbrandtsen from Hong Kong to Atlantic ports in any calendar year from 1949 through the first six months of 1953 have been less than 1 percent of the total carryings of Japan-Atlantic and Gulf Freight Conference vessels operating in that trade. The combined total carryings from Hong Kong by the conference and Isbrandtsen, however, are insignificant when compared with carryings from Japan and the Philippines.

The trade from Japan to the Atlantic Coast of the United States is presently overtonnaged. Total sailings in the trade rose from 109 in 1949 to more than 300 in 1953 (Table 1—projected for 1953). The re-entry of Japanese lines in the trade, four in 1951 and four in 1952, on permission of SCAP, greatly contributed to the excess of tonnage. The effect of the re-entry of the Japanese lines can be readily seen from the fact that those lines in the years 1951, 1952,

and in the first six months of 1953, carried, approximately, 15 percent, 49 percent, and 66 percent, respectively, of the trade's total liner cargo.

United States-flag lines, including Isbrandtsen, but excluding American President Lines and Lykes, carried 53 percent of the total liner cargo in the Japan-Atlantic trade in 1950, 46 percent in 1951, 34 percent in 1952, and 21 percent in the first six months of 1953.

Partly as a result of the overtonnaging in this trade, the vessels of both Isbrandtsen and the conference have had substantial free and usable space after completion of loading in Japan.

At its meeting of October 29, 1952, the conference discussed "strong rumors and indications that some member lines were not adhering to tariff rates and regulations" and resolved to bring the rumored malpractices to the attention of the Japanese Ministry of Transport. In the subsequent letter written to the Ministry, the conference recited the rumored conditions and indicated that the continuance of such a state of affairs "will probably result in a complete breakdown of the conference structures now in existence." In response to the conference letter, the Ministry of Transportation issued a warning to each of the conference member lines.

All postwar conference tariffs have provided for both contract and non-contract rates but only the contract rates have been effective. Prior to November 15, 1952, the effective date of the current Tariff No. 30,[9] the differential between contract and non-contract rates was $4.00 for all commodities. The differential in Tariff No. 30 is 9½ percent of the contract rates, rounded off the the nearest quarter of a dollar. The level of rates in conference postwar tariffs gradually increased between 1947 and November 15, 1952 when a general reduction in rates was effected.

[9] Tariff No. 30 is presently in effect on those items which have not been opened by the conference.

On most commodities, Isbrandtsen's rates, between 1947 and March 12, 1953, were maintained, on the average, at a level approximately 10 percent below the corresponding tariff rates, although individual rates on specific commodities in relation to conference rates have varied considerably, percentagewise, from time to time. The general understanding of shippers and carriers in the trade is that Isbrandtsen underquotes conference rates by 10 percent. From time to time, Isbrandtsen's Tokyo agents have issued, without express consent of Isbrandtsen, so-called abbreviated freight tariffs which compare conference and Isbrandtsen rates on major commodities. On most items of these abbreviated tariffs, Isbrandtsen rates are 10 percent lower than conference rates. As a matter of policy, Isbrandtsen quotes rates lower than those of its competitors, but never knowingly quotes a non-compensatory rate.

Conference rates prior to the outbreak of the rate war in March 1953 were stable, i.e., constant for relatively long periods of time, as were Isbrandtsen's rates for corresponding periods of time. This stability is attributable in large part, however, to the reluctance of the conference to reduce its rates to Isbrandtsen's rate level. Conference increases in rates were followed by Isbrandtsen increases, and when, in November 1952, the conference announced a 10 percent reduction in rates in Tariff No. 30, Isbrandtsen announced that its new rate would be 10 percent less than the conference contract rate.

Conference rates must, under the basic agreement, be filed with the Regulation Office of the Federal Maritime Board and are there open to public inspection. Isbrandtsen is not required to file its inbound rates. Both the conference and Isbrandtsen, however, learn of the other's rates in the normal course of operation in the trade.

Most shippers in this trade are primarily interested in low, uniform and stable freight rates. There is a tendency on the part of Japanese shippers to favor Japanese lines,

but the tendency is limited to a large extent by the desire for lower freight rates as evidenced by the volume of Isbrandtsen's carryings in this trade. Various shippers have considered the general level of conference rates to have been too high, prior to March 12, 1953.

Additionally, shippers testified to a lack of success until subsequent to March 1953, in their efforts to convince the conference to reduce the level of rates on various commodities. They have testified, however, to better relations with the conference since the recent formation of shipper and exporter associations and expressed hope that the conference will give more consideration to shipper's desires in the future.

Changes in uniform conference rates may only be made upon the affirmative vote of two-thirds of the membership entitled to vote.[10] The conference chairman may obtain telephonic votes on rate matters in lieu of a conference meeting and take rate action on the affirmative vote of two-thirds of the members. Although this procedure gives the conference greater rate-making flexibility, the conference is still at a competitive disadvantage as compared with an individual carrier in making rapid rate changes.

At a special meeting of March 9, 1953, the conference discussed steps which might be taken to meet Isbrandtsen's competition and resolved to call a special meeting to pass on a proposal to grant a 20 percent discount on all tariff rate items as a method of meeting non-conference competition and minimizing rumored rebating among the member lines. At a special meeting of March 12, 1955, however, the proposal was rejected and, instead, the conference voted to open conference tariff rates on ten of the major commodities moving in the trade. At various subsequent times the conference has voted to open rates on most of the commodities that move in substantial volume in the trade, with the exception of refrigerated cargo. No advance notice of

[10] States Marine Corporation is not entitled to vote.

the initial or subsequent opening of rates was given to interested shippers, and no minimum rates were established on any of the open rated commodities. The decision to open rates was made "in view of the action taken previously by the Trans-Pacific Freight Conference of Japan."[11] The conference secretary testified that the conference would have lost cargo for points in inland United States to the Trans-Pacific Freight Conference of Japan had this action not been taken. Like the rejected proposal to reduce rates by 20 percent, the opening of rates was directed at non-conference competition and the rumored rebating by member lines. In addition, it was hoped that the rate war would lead to Isbrandtsen's joining the conference or to the institution of the dual rate system or other system.

After March 12, 1953, the level of rates charged dropped, first, to about 80 percent, and later to about 30 percent to 40 percent of the pre-March 12 level. On a fairly large number of items, some lines have charged rates as low as $6.00-$6.50 per ton, while handling costs alone in this trade are approximately $8.50 per ton.

Isbrandtsen attempted to keep on a competitive basis in the rate war until mid-May 1953, when minimum rates were set. Prior to that time Isbrandtsen's rates equalled the lowest charged in the trade.

The minimum rates, first $15.00, later $12.00 to the U.S. Atlantic Coast adversely affected Isbrandtsen's competitive position in the trade. Effective on July 15, 1953, Isbrandtsen set its rates at 50 percent of the conference Tariff No. 30 level. Since that date, Isbrandtsen has carried little cargo in the trade. On July 17, Isbrandtsen announced its desire to apply reasonable rates which might be set by the conference. Since Isbrandtsen reserved the right to adjust its rates where required, however, the conference considered that the Isbrandtsen announcement contained

[11] Conference minutes for March 12, 1953.

insufficient assurance of stability of rates on which to base conference action. In any event, an Isbrandtsen witness testified that the company did not intend the announcement to be an offer to the conference and did not contemplate any agreement, oral or written, with other lines.

Many Japanese shippers have requested the conference to close rates and to end the rate war. The resultant instability has affected the smooth flow of commerce between Japan and the United States; has raised a threat that customs duties in the United States might be increased; has affected the value of inventories of Japanese goods in the United States; has caused requests for postponement of shipments by F.O.B.[12] buyers in the United States, since such buyers assume the risk of fluctuating freight rates. Prices for the sale of Japanese goods are often fixed by the importers in the United States as much as six months in advance of their arrival in the United States.

The conference has shown interest in reinstating a dual rate system since early 1949 and had twice, prior to the present filing, voted to institute the system, first, on August 30, 1950, and, secondly, on October 29, 1952. On the former occasion, the institution of a dual rate system was delayed on advice of counsel. On the latter occasion, necessity for compliance with our General Order 76 caused further delay in effectuating the system. The conference thereafter, on November 17, 1952, resolved to instruct its counsel to file a statement pursuant to General Order 76, advising of the conference's intention to reinstitute dual rates on the 30th day after such filing, the differential between contract and non-contract rates, on commodities covered to be 9½ percent of the contract rates.

Many of the conference lines favored a differential of 12½ percent to 15 percent, as reasonable and more satis-

[12] Although prior to World War II most commodities in this trade moved under c.i.f. terms, most commodities have since been sold on an f.o.b. or f.a.s. basis.

factory than 9½ percent, but considered the conference limited, under Japanese law, to 9½ percent. The membership considered 9½ percent to be reasonable as (1) not so great as to destroy shippers' freedom of choice between conference and non-conference vessels; (2) in substantial accord with the amount of commercial discount customary in Japan and thus reasonable to Japanese shippers; (3) equalling the amount of spread in use by other conferences operating to and from Japan; and (4) roughly paralleling the amount by which Isbrandtsen generally undercuts conference rates. In this respect it was considered that shippers could benefit under a dual rate system by equal distribution of cargoes to conference and non-conference vessels, since the higher conference non-contract rates would be more than offset by the probable 10 percent differential between conference contract rates and Isbrandtsen's rates. No survey was undertaken by the conference, however, to ascertain the number of shippers who could so divide cargoes between Isbrandtsen and the conference or the volume of cargo which might move under dual rate contracts. The conference is able, however, roughly to estimate the amount of cargo which member lines would obtain under dual rates, because of its support of various exporter organizations and through its knowledge of the trade.

Shipper witnesses in this proceeding have indicated that a 9½ percent differential would be reasonable or within a zone of reasonableness. One shipper, however, indicated that the spread should vary with the relationship between the cost of a commodity and its transportation costs. Where the manufacturer's cost is lower than the freight costs, it was stated, the differential should be low to avoid coercion on the shipper. The shipper indicated, however, that in view of the commodities on which a higher spread reasonably could be applied and in view of the impracticability of ascertaining the relationship of manufacturer's cost to freight cost for each commodity in each instance, the overall spread of 9½ percent between contract and non-contract

rates would be fair, reasonable, profitable and acceptable to shippers. Another shipper withdrew his opposition contingent upon the premise of better future cooperation by the conference in negotiating freight rates with shippers and in discussing terms and conditions of the dual rate contracts.

The conference is subject to the regulatory jurisdiction of the Japanese Government as well as to that of the U. S. Government. While the Fair Trade Commission, the agency responsible for final determinations under the Japanese Marine Transportation Law,[13] does not give prior approval to dual rate contracts, that agency advised the conference that a 9½ percent differential was the highest that it had yet allowed.

It is reasonable to anticipate a total cargo movement of 500,000 revenue tons per year in this trade in view of the trend towards increased movement since World War II. Of this tonnage, it is anticipated that the conferenee, under dual rates, would carry about 90 percent or less of the total cargo and Isbrandtsen 10 percent or more, a substantial reduction from its carriage in 1952, of 26 percent of the cargo in the trade. Assuming that Isbrandtsen would carry, under single closed rates 20 percent of an annual 500,000 revenue tons, irrespective of whatever rates may eventually be established by the conference if those rates exceed out-of-pocket expenses, the conference lines, in employing the proposed dual rate system, would have to carry an additional 38,000 revenue tons of cargo in order to grant a discount of 9½ percent and still earn the same gross revenues they would have earned carrying 80 percent of the total liner cargo movement without discount. Since, as stated, the conference could be expected to carry 90 percent of the

[13] Law No. 187, June 1, 1949.
Articles 28 and 30 of that law prohibit: (a) deferred rebates, (b) fighting ships, (c) retaliation against a shipper, (d) unjustly discriminatory contracts based on volume of freight, (e) undue or unreasonable preference or prejudice, and (f) combinations that exclude any party from admission.

total liner cargo, or about 50,000 additional revenue tons, it is clear that the use of the system would result in a reduction in the average fixed unit costs of conference vessels.

Isbrandtsen's carryings, if a dual rate system were put into effect in this trade, would be limited by the lack of reefer space and special silkrooms on Isbrandtsen's vessels and by the limited frequency and range of service of those vessels. Shippers of dry cargo destined for Gulf ports, shippers of reefer cargo, and shippers requiring more than two sailings per month would, practically, have no choice between the conference and Isbrandtsen's service as presently constituted.

There would, under the dual rate system, be no difference in the cost or value of service rendered to two shippers, one of which is a contract signatory and the other of which is not a contract signatory, although the cargoes of each might be identical and identically destined. The contract shipper, however, by enabling the conference lines to estimate the amount of cargo available for carriage, and accordingly, to plan vessel sailings and space in a more economical fashion, aids those carriers in reducing unit costs of carriage, and thus, to improve their services to shippers.

The proposed form of dual rate contract would be entered into between individual shippers and the several members of the conference for an indefinite period, subject to cancellation by either party on three months' notice. The shipper, under Article 1, would be obliged to forward by conference vessels all shipments made directly or indirectly by him "whether such shipments are made C.I.F., C. & F., F.O.B., ex godown or by any other terms." This provision is modified by Article 6 which specifies that if a shipper submits written proof *satisfactory to the* conference secretary that a foreign buyer, on an f.o.b. or f.a.s. shipment has designated a non-conference vessel for a shipment, then such shipment is exempt from the terms of the agreement. Such foreign buyer would be thereafter denied contract

rates until such time as the buyer should execute a dual rate contract. Until the first shipment via non-conference vessel, however, the foreign buyer on f.o.b. or f.a.s. shipents may receive the benefit of contract rates without signing a contract.

In the event of breach of the agreement by the shipper by shipment via non-conference vessel, the shipper contracts to pay, as liquidated damages, 50 percent of the freight which would have been paid at conference contract rates, had the shipment moved via a conference line. In turn, the conference members agree to maintain a shipping service adequate to meet the reasonable requirements of the trade. Each carrier, under Article 11, is responsible for its own part of the agreement only. Although the carriers do not agree to respond in damages in the event of any inadequacy of service, they do agree, in Article 4 that a shipper may secure space elsewhere, if after application to the conference secretary he is not notified within three days, Sundays and holidays excepted, of the availability of space on conference vessels within the ensuing fifteen day period.

Article 11 provides that new lines admitted to conference membership shall automatically become entitled to participation in the contract. Under Article 12 shippers are required to submit an approximation of the annual tonnage which would move under the contract. Rate increases would not be effective until the expiration of the calendar month in which notice of increase is given and of the two following calendar months. The entire agreement is subject to all conference rules, regulations, terms and conditions of the conference tariff current at the time of shipment.

Most shippers appearing in this proceeding were not familiar with the terms of the proposed contract. One shipper was under the impression that the terms of the contract had not yet been definitely arrived at and, like the rates, were to be the subject of discussions between the shippers

and the conference. Subsequently, a large shipper organization submitted proposed contract amendments to the conference, including recommendations that (1) the volume of obligated cargo should not be less than 85 percent of the shipper's total cargo moving in the trade; (2) an f.o.b. or f.a.s. shipment cannot move under contract rates unless the Japanese shipper is authorized to route the shipment or unless the f.o.b., f.a.s. buyer is signatory to a dual rate contract; (3) rate increases should not be effected until the termination of the calendar month in which notice of increase is given and of the three succeeding calendar months; (4) if the carriers do not furnish service on request, the shipper may (a) ship via non-conference line if not notified by the secretary of space aboard a conference vessel within the period of time *designated by the shipper* and (b) recover from the conference, as liquidated damages the excess of freight, above conference rates, actually paid for shipment; (5) liquidated damages for breach of agreement by the shipper should be 20 percent of the freight which the shipper would have paid had the shipment moved via conference vessel; and (6) the carriers and the shippers should appoint a special committee, composed of representatives of each, for the purpose of discussing amendments to the agreement and reasonable levels of freight rates.

Discussion and Ultimate Findings

Parties to this proceeding have questioned our authority under section 15 of the act to approve any dual rate system and urge that such systems are in themselves unlawful, without regard to specific facts which may be adduced.

The protests and comments directed by petitioners to the conference's statement filed pursuant to General Order 76, put in issue the lawfulness of the dual rate system itself in addition to raising issues of fact.

It is urged by petitioners that the system is necessarily unlawful under section 14 of the act and that we are without statutory authority to approve the dual rate system under

section 15 of the act. More particularly stated, petitioners' arguments are as follows:

(1) Paragraph 3 of section 14 of the act makes unlawful any retaliation against shippers by resort to discriminating or unfair methods because such shipper has patronized any other carrier. Since any discrimination is prohibited by the section and not only those discriminations which are unjust, unreasonable or unfair, since the charging of different rates for the same service is prima facie discriminatory, and since the system is a device for compelling exclusive patronage, the dual rate system is necessarily violative of section 14 of the act.

(2) Section 15 forbids approval of agreements which are in violation of the act. Since, it is argued, dual rate systems are violative of section 14 of the act, approval may not be given under section 15 of the act to an agreement to institute a dual rate system. Further, it is said, dual rate systems are necessarily unjustly discriminatory within the meaning of section 15 of the act in that prohibitions against "unjust discrimination," or similar words, historically forbid any difference in transportation costs not based on transportation conditions such as cost or value of services. For this reason, it is said that the phrase "unjust discrimination" forbids differences in rates based on competitive considerations alone.

Previous Judicial and Administrative Decisions

These contentions, frequently addressed to us and to our predecessors, as well as to the courts, have never been adopted by judicial or administrative bodies, as revealed by the reexamination of the decisions of those bodies which follows.

Dual rates were first considered by our predecessor, the Shipping Board, in *Eden Mining Co. v. Bluefields Fruit & S.S. Co.*, 1 U.S.S.B. 41 (1922). In that proceeding, commenced on complaint of a non-contract shipper, the Shipping Board found the dual rate practices of a single carrier

to be in violation of sections 16 and 17 of the act. The system there considered was analogized with the facts in *Menacho* v. *Ward*, 27 Fed. 529 (S.D.N.Y., 1886) where a carrier was restrained from charging higher rates to shippers who had patronized another carrier. The *Menacho* case did not involve a contract system, and it was the retaliation inherent in charging higher rates, rather than the difference in rates to shippers which was condemned. In the *Eden* case, no retaliation was found, but on the facts, the Shipping Board found violations of sections 16 and 17 of the act because of the difference in rates charged for identical service. Since the Board refused to find violations of paragraphs 3 and 4 of section 14 of the act, it is apparent that it did not consider the dual rate system unlawful per se under section 14. Indeed, the Board specifically stated, at page 45:

"... It should be here remarked, however, that we do not decide whether under that act (Shipping Act, 1916) the according of lower rates to those shippers who contract to confine their shipments to a certain carrier or carriers are lawful when based upon regularity of consignments, number of shipments, or quantity of merchandise furnished for transportation, as in the instant case no such question is presented for determination."

Thereafter, the Shipping Board commenced an investigation of the dual rate exclusive patronage contract system, as practiced in shipping conferences operating on trade routes having termini in the United States. That investigation, *Ex Parte 5 Contract Rate Investigation*, was discontinued as a formal proceeding upon objection of respondent carriers.[14] The proceeding was thereafter dismissed by

[14] Statement made by Bureau of Regulation at opening of hearing 2:30 P.M.—November 10, 1926:

"Out of consideration of the point of view expressed by the attorneys of the respondents this morning it is ruled that no orders will be entered in or as a result of this hearing having in view declaring any contracts the respondents or any of them may have made with shippers as illegal.

"This statement is not to be understood as conceding in any degree that the procedure we have here followed was not within the powers of the Board. Statements now made need not be under oath but the hearing will be continued for the purpose of receiving information from the respondents relative to the subject of the resolutions on which this hearing is based."

resolution of the Shipping Board,[15] without approving or disapproving of the practice as a whole or of specific applications thereof. No report in this matter was ever adopted or issued by the Shipping Board.[16]

[15] "The Shipping Board at a meeting on February 23, 1927, adopted the following resolution:

"*Whereas*, By resolutions of June 16, 1926, and July 13, 1926, the Board, under authority of Section 22 of the Shipping Act, 1916, entered upon a proceeding of investigation and inquiry in connection with the practice of carriers of charging 'contract' and 'non-contract' rates; and

"*Whereas*, At the outset of the hearing the Board on its own motion discontinued it as a formal hearing in the case, thenceforth proceeding informally, but without prejudice;

"*Resolved*, That the proceeding be, and the same is hereby dismissed."

[16] In another proceeding, the combined Dockets 725 and 751, counsel for Isbrandtsen attacked the Shipping Board's resolution of February 23, 1927 (footnote 15, *supra*) as "suppressed Docket," considers Public Counsel's discussion of the case as misleading, and apparently considers a draft report in the matter which was neither agreed on or adopted by the Shipping Board as an official report, as indicated by his statement which follows:

". . . Why did someone not dare to publish this extraordinary Report in *Ex Parte 5*? What follows demonstrates.

"This suppressed Docket, was unearthed for us, from the Archives. It reads like a melodrama."

After recital of the commencement of the investigation and its dismissal as a formal proceeding, counsel commented in the following manner on the unadopted draft report and the Shipping Board's dismissal of the matter without prejudice.

"Thus, the Board let go of the bear it had by the tail. It was, in fact, dragged away by the brute force of overwhelming, baseless arguments, advanced by Conference spokesmen.

"The same sort of 'brush-off' has continued right down to date. . . ."

"This atmosphere of obstruction surrounding the attempt of the Maritime Authorities to do their sworn duty, and enforce the law, has pervaded their offices ever since. No Board Members have yet summoned up enough courage, on their very own, to repulse this pressure and dissipate the deliberately beclouded atmosphere."

In the interest of accuracy, we report the facts. As stated, the only "Report" in this matter was a Shipping Board resolution, set out in footnote 15, *supra*. The draft report referred to by counsel for Isbrandtsen as a report of the Board was, as stated, unapproved and unadopted. Counsel refers to both the resolution of February 23, 1927, and the draft report as official reports of the Shipping Board without explanation of their great differences and without discussion of the fact that the draft report had no status as a report of Board action.

Counsel implied that the file in *Ex Parte 5* was unearthed through his diligence, despite efforts to suppress the file. Actually, Public Counsel learned of the report and at once made the results of his research available, in brief in Docket 730, to other interested parties. Further and persistent efforts by Public Counsel and other Board employees resulted in the location of the file in *Ex Parte 5* which had been misfiled by this agency prior to shipment to the National Archives. The entire file, in-

The system was first brought to the attention of the courts in *United States Nav. Co.* v. *Cunard S.S. Co.*, 39 F. 2d 204 (S.D.N.Y. 1929); *aff'd*, 50 F. 2d 83 (C.A. 2 Cir. 1931); *aff'd*, 284 U.S. 474 (1932). There a complaint alleged that the dual rate practices of defendant steamship lines were in violation of the Sherman Anti-Trust Act (15 U.S.C.A. 1-7, 15) and the Clayton Act (38 Stat. 730) and sought an injunction against such practices. It is significant that although differentials of 100 percent between contract and non-contract rates were alleged and the precedent of the *Eden* case was cited in support of arguments that agreements to charge dual rates could not legally be approved by the Shipping Board, the district court, nevertheless, granted a motion to dismiss on the ground that the matter involved questions within the exclusive primary jurisdiction of the Shipping Board. Complainants did not thereafter file a complaint with the Shipping Board.

The dual rate system was next considered by the Shipping Board in *Rawleigh* v. *Stoomvaart et al.*, 1 U.S.S.B. 285 (1933). There, where the issues were confined to the lawfulness of the contract rate practice per se, the Shipping Board held that dual rate practices *qua* practices do not contravene any of the regulatory provisions of the act. The *Eden* case was distinguished on the grounds that (1) the system considered in that case was practiced by a single carrier and denied the shipper a choice of carriers; (2) the contracts bound shippers to the carrier on both northbound and southbound shipments, although lower rates were afforded on southbound shipments only; and (3) the carrier gave no assurance against increase of rates without notice.

In the *Rawleigh* decision, the Shipping Board enunicated several basic considerations which are critical to any dis-

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cluding opinions of the agency general counsel, inter-office correspondence, and draft reports not approved by the Shipping Board members, was made available to counsel for Isbrandtsen. While some such material is not a matter of public record, the entire file was placed at the disposal of counsel for Isbrandtsen in order to offset any disadvantage to which he may have been put by virtue of the misfiling of *Ex Parte 5* by this agency.

cussion of the lawfulness of the dual rate system. It was stated, first, that although that system in itself is lawful, the spread between contract and non-contract rates can be such in amount as to constitute unlawfulness. Second, the Shipping Board stated that the system must be considered to have been approved in principle by the House of Representatives Committee on Merchant Marine and Fisheries of the 62nd and 63d Congresses (hereinafter "Alexander Committee"[17]), in its report (Alexander Report) and recommendations [18] which formed the foundation for ultimate passage of the act. Third, the Shipping Board considered that "the absence of materially different service before and since the inauguration of the practice" did not render the system unlawful and *that the necessity for protecting established services* justified, in that case, the adoption of the dual rate system.

The Secretary of Commerce in *Intercoastal Investigation, 1935*, 1 U.S.S.B.B. 400 (1935), in finding several dual rate systems to be unlawful under sections 16 and 18 of the act, stated, at page 452, that dual rate contracts "do not constitute a transportation condition as to warrant a difference in transportation rates." That language, clearly indicating illegality of the system per se is considerably weakened, however, by the following discussion, at p. 454 of the report of the Secretary of Commerce:

"It is clear that when intercoastal carriers were not required to file the rates charged shippers, but only their maximum rates, and carriers freely engaged in rate wars, the contract rate system served a useful purpose, but conditions have been changed by the Intercoastal Shipping Act, 1933, which requires that unless specifically authorized by the department, rates may not be changed on less than thirty days' notice to the public, and also authorizes the department either upon complaint or upon its own initiative to suspend proposed changes in the rates and enter upon hearings concerning the lawfulness thereof."

[17] Hon. Joshua W. Alexander of Missouri, Chairman.

[18] H. R. Doc. 805, 63d Cong., 2nd Sess., 1914.

An order issued in *Intercoastal Investigation, 1935 (supra)* condemning the contract rate system employed by the Gulf Intercoastal Conference was vacated and a new proceeding was commenced to determine the validity of a contract system in use in the Gulf-Pacific Coast trade. In his report in this proceeding, *Gulf Intercoastal Contract Rates*, 1 U.S.S.B.B. 524 (1936), the Secretary of Commerce found the contract system in question not justified by transportation conditions in the trade and unduly and unreasonably preferential and prejudicial in violation of section 16 of the act. The Secretary's finding of unlawfulness *under the facts before him* turned on his conclusion that there was no need for the use of the system in domestic commerce where rates are subject to Government control and, hence, no justification for the discrimination inherent in the system.[19] Significanfly, the report stated, at p. 529:

"In the *Rawleigh case* the evidence showed that the purpose and ultimate effect of the contract rate system as employed in that trade was to enable the carriers to approximate the volume of cargo that would move over their lines and to insure stability of rates and regularity of service. Operators of vessels in our foreign commerce may at any time and without warning be subjected to severe competition by tramp vessels of any nation. Unlike the intercoastal trade, there exists no statutory requirement that changes in rates be published thirty days in advance, nor is the department given any power to suspend such changes."

[19] Counsel for Isbrandtsen argues that language in our report on motion in Docket 759, *Anglo Canadian Shipping Co.* v. *Mitsui S. S. Co.*, 4 F.M.B. 535 (January 27, 1955), discredits the decision in *Gulf Intercoastal Rates (supra)*. In the *Mitsui* case prior to reversing an early decision in *Intercoastal Investigation, 1935 (supra)*, insofar as that decision found the practice of underquoting rates of competitors by fixed and lower differential to be in violation of the act, we stated:

> "At the outset, the fact that the intercoastal investigaion in 1935 was directed solely at practices existing in interstate as distinguished from foreign commerce is not significant."

In that case, we were required to consider the per se legality of a rate practice. The differing facts surrounding intercoastal and offshore shipping were immaterial to the legal construction of a statutory provision regulating both types of transportation. In *Gulf Intercoastal Rates (supra)*, however, the Secretary of Commerce, determined *as a fact* that regulation of the intercoastal trade under the Intercoastal Act, 1933, dispelled the need for a dual rate system in that trade.

The report thereafter resolved the apparent conflict within *Intercoastal Investigation, 1935 (supra)* and rejected the concept of per se illegality of the dual rate system, in stating, at p. 530:

"Whether any such (dual rate) system (in foreign commerce) is lawful is a question which must be determined *by the facts in each case.*" (Emphasis supplied.)

Respondents thereafter commenced an action in the U. S. District Court for the District of Columbia to set aside the order of the Secretary of Commerce requiring cancellation of the dual rate schedules considered in *Gulf Intercoastal Contract Rates (supra).* The bill was dismissed and the Secretary's action upheld by that court in a decision reported as *Swayne & Hoyt, Ltd. et al.* v. *U. S.*, 18 F. Supp. 25 (D.D.C. 1936). On appeal to the Supreme Court, the decree of the District Court was affirmed. *Swayne & Hoyt, Ltd. et al.* v. *U. S.*, 300 U.S. 297 (1936). The Supreme Court not only held that the Secretary's order was based on substantial evidence but also agreed with the Secretary's construction of the act, stating, at p. 304:

"In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether, as appellants urge, it operated to secure stability of rates with consequent stability of service, and, so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter. This was clearly recognized in the report upon which the present order is based. It states that the danger of cut-throat competition was lessened by § 3 of the Intercoastal Shipping Act of 1933, and that the contract system tends to create a monopoly. In view of the assurance of reasonable rate stability afforded by the Act of 1933, the Secretary concluded that this was the real purpose of the contract rate."

In the same vein the Court stated, at p. 305:

". . . We think there was evidence from which the Secretary could reasonably conclude that there was little *need* for a contract rate system to assure stability of service." (Emphasis added.)

In *Phelps Bros. & Co., Inc.* v. *Cosulich-Societa Triestina D. Navigazione et al.*, 1 U.S.M.C. 634 (1936), the Maritime Commission found that the dual rate system of a conference was not unjustly discriminatory or unfair as between carriers if membership in the conference was open to independent carriers. The Commission further found that the system did not result in undue prejudice to shippers, since neither injury to shippers nor unreasonableness of the non-contract rates had been shown.

In 1939 the Maritime Commission considered the validity of the system in *Contract Routing Restrictions*, 2 U.S.M.C. 220. There, in an investigation commenced by the Maritime Commission, the system as employed by four outbound North Atlantic conferences was disapproved under section 15 of the act as unjustly discriminatory and unfair between the ports and between shippers and as detrimental to the commerce of the United States. The Commission followed the standards enunciated by the Supreme Court in *Swayne & Hoyt, Ltd. et al.* v. *U. S. (supra)*.

That the Commission considered *need* for the system to be a critical factor to such determination is evident from the following language at p. 226:

". . . There is nothing of record which would lead us to believe that the routing restriction in the contracts is vital to the maintenance of stability of service and rates."

Postwar administrative reports on dual rate practices continued to hold that system not unlawful per se. Such a determination was first made in this period in *Pacific Coast European Conference Agreement*, 3 U.S.M.C. 11 (1948). There the Commission measured the advantages and disadvantages of the dual rate system in the trade under consideration in the light of need for the system, stating in conclusion, at p. 17:

". . . The contract rate system is a *necessary practice* in this trade to secure the continuance of the conference; the frequency, dependability and stability of service; and the uniformity and stability of freight rates." (Emphasis supplied.)

In 1948 in the U. S. District Court for the Southern District of New York, Isbrandtsen sought to restrain the Eastbound and Westbound North Atlantic conferences from instituting a dual rate system and to set aside orders of the Maritime Commission which approved the basic agreements of those conferences, insofar as approval of the agreements authorized institution of dual rate systems. The injunction was granted conditioned on Isbrandtsen's diligent presentation before the commission of a complaint challenging the validity of the agreements. *Isbrandtsen Co., Inc. v. United States et al.*, 81 F. Supp. 544 (S.D.N.Y. 1948), appeal dismissed sub nom. *A/S J. Ludwig Mowinckels Rederi* v. *Isbrandtsen Co., Inc.*, 336 U.S. 941 (1949). In spite of the granting of the injunction, however, the Court's language, at p. 546, is significant in view of arguments directed to the Court by Isbrandtsen, urging that the system is illegal per se:

> "It may be that the 'exclusive patronage' provisions are prohibited by 46 U.S.C.A. § 812[2] and that the Commission is powerless to approve such provisions under 46 U.S.C.A. § 814. Very considerable doubt upon such a holding is thrown by *Swayne & Hoyt, Ltd.*, v. *U. S.*, 1937, 300 U.S. 297, 306, 307 and note 3, 57 S. Ct. 478, 81 L. Ed. 659, and by the legislative history of the statute, H.R. Doc. No. 805, 63rd Cong., 2nd Sess., 1914, 287-292.
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> "[2] Section 14 of the Shipping Act, 46 U.S.C.A. § 812, prohibits deferred rebates and retaliation by discriminating or unfair methods against a shipper because such shipper has patronized any other carrier."

Isbrandtsen thereafter filed a complaint with the Maritime Commission, seeking a declaration of unlawfulness under sections 14 and 15 of so much of the respondent's basic agreements as purported to authorize institution of dual rate systems. The complaint was heard by this Board, in its capacity as successor to the Maritime Commission, and the decision thereon reported in *Isbrandtsen Co.* v. *North Atlantic Continental Freight Conference et al.*, 3 F.M.B. 235 (1950). The Board dismissed the complaint,

inding (1) that the dual rate system is not illegal per se nder section 14(3) or other sections of the act and (2) hat the particular dual rate systems sought to be employed vere not unfair or unjustly discriminatory, in violation of he act or detrimental to the commerce of the United States.

Isbrandtsen's appeal from the Board's order was ustained in *Isbrandtsen v. United States*, 96 F. Supp. 883 (S.D.N.Y. 1951), affirmed by an equally divided court sub nom., *A/S F. Ludwig Mowinckels Rederi v. Isbrandtsen Co.*, 342 U.S. 950 (1952). It should be noted, however, that sbrandtsen, as well as intervener U. S. Department of Agriculture urged that the dual rate system is inherently discriminatory and retaliatory in violation of section 14(3) f the act and for that reason, among others, could not be pproved by the Maritime Commission (Board) under ection 15 of the act. The District Court refused to find the ystem unlawful per se in spite of the specific request. The ourt issued a permanent injunction, however, on the ground hat the Board had erred in approving a system of dual ates as not unjustly discriminatory and unfair in the face f an implicit finding that the differential or spread between ontract and non-contract rates had been arbitrarily arrived t.

On July 31, 1952, the Board served notice of its intention f adopting a procedural rule governing the initiation or odification of dual rate systems by conferences.[20]

Thereafter, on September 4, 1952, the North Atlantic ontinental Freight Conference advised the Board of its tention of instituting a dual rate system, effective October 1952.[21]

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[20] The rulemaking proceeding resulted in promulgation of General der 76.

[21] Although the North Atlantic Continental Freight Conference initially fused to hold the institution of the system in abeyance pending deter- nation of the reasonableness of the differential or spread between con- ct and non-contract rates, it later withheld the operation of the system the request of the Board. See *Contract Rates—North Atlantic Con- ental Freight Conference et al.*, 4 F.M.B. 98 (1952).

The Board thereafter commenced an investigation to determine whether the differential between contract and non-contract rates was unjustly discriminatory and in violation of the act. That investigation was discontinued by order of the Board following its report in *Contract Rates—North Atlantic Continental Freight Conference*, 4 F.M.B. 355 (1954), in which the differential between contract and non-contract rates was found on the facts to be not arbitrary or unreasonable nor unjustly discriminatory, nor in violation of the act. The decision did not constitute approval of the dual rate system in the trade in question, since other questions were reserved for later determination. Subsequent to commencement of the investigation of the *North Atlantic Continental Freight Conference's* proposed dual rates, the Board promulgated General Order 76. The General Order required submission of a statement, in applications for institution of dual rate systems, informing the Board of the amount of the spread, the effective date, and reasons for the use of the system in the particular trade involved, as well as transmitting copies of the contract. Accordingly, in the *North Atlantic* case, the Board specifically required compliance with General Order 76, nothwithstanding the decision, and reserved questions of per se unlawfulness of the system for determination in Docket No. 725, *Secretary of Agriculture v. North Atlantic Continental Freight Conference, et al.*

In *Far East Conference v. United States*, 94 F. Supp. 960 (D.N.J. 1951), rev'd. 342 U.S. 570 (1951), the Attorney General brought an action to enjoin defendants from using a dual rate system. A motion to dismiss on the ground that the Federal Maritime Board had exclusive primary jurisdiction was denied by the District Court. The Supreme Court reversed the district court although it had been argued by the Attorney General that the Board is without power to approve the dual rate system.

On December 24, 1952, this conference filed a statement under General Order 76 proposing to institute a dual rate

system. In protests against the proposed system Isbrandtsen and Justice requested a hearing, as well as suspension of the system pending completion of those hearings. The Board, by order dated January 21, 1953, granted hearing on the protests, but refused to suspend the institution of the system, stating that it did not appear that the differential between contract and non-contract rates was arbitrary, unreasonable or unjustly discriminatory or that the initiation of the system would be unjustly discriminatory or unfair or detrimental to the commerce of the United States or would cause irreparable harm to Isbrandtsen.

On petition of Isbrandtsen, the U. S. Court of Appeals for the District of Columbia granted a temporary stay of the Board's order of January 21, 1953 and later issued a temporary injunction against so much of the order as purported to approve institution of the dual rate system. The court thereafter set aside that much of the Board's order and enjoined the conference from effectuating the system prior to specific Board approval, holding that an agreement to institute a dual rate system is beyond the scope of authority of a provision in a basic conference agreement authorizing fixing of rates and may not be effectuated prior to specific Board approval under section 15 of the act. *Isbrandtsen Co., Inc.* v. *U. S.*, 211 F. 2d 51 (C.A.D.C. 1954), cert. denied 347 U.S. 990 (1954). Thereafter this proceeding was instituted for the purpose of considering the merits of the conference's application.

It has been the view of our predecessors that, while the charging of different rates for similar cargoes identically destined is prima facie discriminatory, a difference in rates may be justified where made necessary by competitive conditions existing in the trade in which the carriers are engaged. It is significant that neither the courts nor our predecessors have ever honored contentions that the system is illegal per se. They have uniformly refusd to find that (a) the system is necessarily retaliatory within the mean-

ing of section 14(3) of the act; (b) assuming retaliation, *any* discrimination is forbidden by section 14(3) of the act; (c) the words "unjustly discriminatory" as employed in section 15 of the act are words of act forbidding any discrimination and therefore prohibit Board approval of dual rate systems under section 15 of the act; or (d) the words "unjustly discriminatory" in section 17 of the act and/or "undue or unreasonable preference or advantage" in section 16 of the act prohibit any difference in ocean transportation charges not based on cost or value of service and therefore preclude Board approval of dual rate systems under section 15 of the act.

Alexander Report

Of particular persuasion to the conclusion that the dual rate system is *not* illegal per se is a footnoted remark of the Supreme Court in *Swayne & Hoyt, Ltd.* v. *U. S. (supra)*, stating that the Alexander Committee did not condemn the dual rate system.[22] That committee recognized, from the extensive investigation undertaken, the underlying instability of unregulated foreign commerce and the natural gravitation toward complete monopoly through elimination of weaker lines in recurring rate wars, agreements between carriers or consolidation of service under common ownership.[23]

Recognizing that monopoly was unavoidable in any event, the committee rejected the possibility of permitting unrestricted competition and chose the conference system as the least objectionable type of shipping monopoly, where subject to effective government supervision and if purged of its most objectionable features. Those objectionable features prior to 1916 were, first, the secrecy surrounding agreements between carriers and, second, certain unfair competitive methods then employed by the unregulated con-

[22] *Swayne & Hoyt, Ltd.* v. *U. S.*, *supra*, at p. 307, footnote 3.

[23] 4 Alexander Report 416.

ferences. The committee recommended that the first objection be met by requiring all conference agreements, understandings, or arrangements to be filed with, and approved by a government regulatory body.[24] The second objection was met by a recommendation for legislation prohibiting *specified* unfair practices including fighting ships, deferred rebates, and retaliation against shippers.[25] The recommended prohibitions were adopted by Congress in section 14 of the act.

Although the committee recognized the dual rate system as an existing means of meeting non-conference competition,[26] the use of that system was not included among the unfair competitive methods itemized at p. 417 of the report and condemned in the committee's legislative recommendation. On the contrary, in its summary of disadvantages of shipping conferences and agreements as reported by witnesses before the Alexander Committee, the Alexander report distinguished the contract system from the deferred rebate system in the following manner:[27]

"VII. *That deferred rebate systems are objectionable and should be prohibited for the following reasons:*

1 By deferring the payment of the rebate until three or six months following the period to which the rebate applies ship owners effectively tie the merchants to a group of lines for successive periods. *In this connection it is argued that the ordinary contract system does not place the shipper in the position of continual dependence that results from the deferred rebate system.*". (Emphasis supplied.)

While the foregoing distinction represents the testimony of witnesses before the committee, the committee's later specific prohibition against deferred rebates, and the absence of a specific prohibition against the use of "ordinary contract system" in the committee's recommendations indi-

[24] 4 Alexander Report, 419, 420.
[25] 4 Alexander Report, 421.
[26] 4 Alexander Report, 290.
[27] 4 Alexander Report, 307.

cates an adoption by the committee of the witnesses' testimony in this respect.

In support of the view that Congress intended, in the act, to prohibit only those practices specifically condemned, we offer the following testimony of Dr. Emory Johnson[28] in hearing on H.R. 14337:

"The theory in accordance with which the bill has been framed is that the law for the regulation of carriers by water shall state with precision what is required of carriers as regards their agreements, rates, and practices . . .

"The experience which the Interstate Commerce Commission has had in the regulation of carriers by rail shows the importance of including in an act, such as the one under consideration, a specific and detailed enumeration of the prohibitions and requirements imposed upon the carriers, and of the powers that may be exercised by the board intrusted with the administration of the act. A law less definite than the one proposed would almost certainly lead to controversy and litigation . . ."

It is no answer to state that the dual rate system was not in existence at the time of issuance of the Alexander Report. The references in the Report to the contract system fully meet this argument.

We see little merit in petitioners' arguments that the judicial history of "unjust discrimination," as revealed by decisions under section 2 of the Interstate Commerce Act (ICA)[29] and under section 90 of the English Railway

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[28] Dr. Emory R. Johnson, Professor of Transportation and Commerce, University of Pennsylvania, participated in drafting H.R. 14337.

[29] Section 2 of the Interstate Commerce Act provides:

"*Special rates and rebates prohibited.* If any common carrier subject to the provisions of this chapter shall, directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property or the transmission of intelligence, subject to the provisions of this chapter, than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation or transmission of a like kind of traffic or message under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of unjust discrimination, which is prohibited and declared to be unlawful."

Clauses Consolidation Act of 1845 from which section 2 of the ICA was derived, makes unlawful any difference in rates charged to shippers for identical cargoes shipped over the same line for the same distance and under the same circumstances of carriage. If, as argued by petitioners, sections 14, 15 and 17 were indeed derived from comparable sections of the ICA in the same manner as section 16 of the act was patterned after section 3(1) of the ICA and section 2 of the English Railway and Canal Traffic Act of 1854, we would be influenced by that argument. The Supreme Court in *U. S. Navigation Co.* v. *Cunard (supra)* indicated, at p. 481, that " . . . the settled construction of the. . . . (ICA) must be applied to the . . . (Shipping Act, 1916) unless, in particular instances, there be *something peculiar in the question under consideration, or dissimilarity in the terms of the act relating thereto, requiring a different conclusion.*" (Emphasis supplied.)

Section 2 of the ICA, however, has no counterpart in the act. Section 4 of H.R. 14337 contained language[30] strikingly similar to section 2 of the ICA, but that language was deleted from the later and ultimately enacted bill, H.R. 15455. In the hearing on H.R. 14337 in which this deletion was considered, a witness recommended:[31]

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[30] Section 4, First, of H.R. 14337:

"Sec. 4. That it shall be unlawful for any common carrier by water, or other person subject to this act, either directly or indirectly—

"First. To charge, demand, collect, or receive from any person or persons by any special rate, rebate, drawback, or other device a greater or less compensation for any service rendered or to be rendered in the transportation of passengers or property subject to the provisions of this act than it charges, demands, collects, or receives from any other person or persons for doing for him or them a like service in the transportation of a like kind of traffic under substantially similar circumstances and conditions: *Provided*, That nothing in this act shall prevent the carriage, storage, or handling of property free or at reduced rates for the United States, State, or municipal governments, or for charitable purposes, or to or from fairs and expositions for exhibition thereat, or the giving of reduced rates to ministers of religion, or to municipal governments for the transportation of indigent persons, or to inmates of the National homes or State homes for disabled volunteer soldiers, and of soldiers' and sailors' homes, including those about to enter and those returning home after discharge, under arrangements with the board of managers of said homes."

[31] Hearings on H.R. 14337, 64th Cong., 1st Sess., at p. 136.

". . . We feel *the first part of section 4* would be very difficult to act under and to advise upon, and that section 5 embodies some matters that it is unnecessary, and therefore undesirable, at this stage of the development of the American merchant marine, to incorporate in the act. Instead of those sections we propose to redraft section 5 so as to include in it the substance of the matter of sections 4 and 5 *to the extent necessary to prevent injustice*, if you conclude that you must have regulation. As the revised paragraph is short, perhaps I had better read it:

'Sec. 5. That whenever, after full hearings upon a sworn complaint, the board shall be of opinion that any rates or charges demanded, charged, or collected by any common carrier by water in foreign commerce are unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors, the board is hereby empowered to alter the rates or charges demanded to the extent necessary to correct such unjust discrimination or prejudice, and to make an order that such carrier shall cease and desist from such unjust discrimination or prejudice.'" (Emphasis supplied.)

The words "to the extent necessary to eliminate injustice" clearly reveal the intent of the redrafters of section 5 to eliminate an absolute prohibition against discriminations in favor of a prohibition against only those discriminations which are unjust.

The witness' recommendations were, in part, adopted in H.R. 15455. While a revised section 5 was in substance followed in the first paragraph of section 18 of the bill (section 17 of the act), section 4 of H.R. 14337 was not eliminated. That section was substantially adopted, with the notable exception of the first paragraph, objected to by the witness, in section 17 of H.R. 15455 (section 16 of the act).[32]

Section 18 of H.R. 15455, based on the revised section 5 hereinabove set out, was conspicuously silent on the subject

[32] Dr. Emory R. Johnson, who had assisted in drafting the bill, described section 4, First, of H.R. 14337, at p. 27 of the House of Representatives Hearings on that bill, as containing an "absolute prohibition" against "a rebate or a drawback on a rate."

of special rates, into which category dual rates necessarily fall and bore little resemblance to section 2 of the ICA. We, therefore, consider decisions under section 2 of the ICA to be of no persuasion here.

As stated herein and in our Report on Motion in *Anglo Canadian Ship. Co., Ltd., et al.* v. *Mitsui*, 4 F.M.B. 535 (January 27, 1955), section 16 of the act was patterned after section 3(1)[33] of the ICA and section 2 of the (English) Railway and Canal Traffic Act of 1854, both of which earlier provisions forbade granting to shippers any preference or advantage which is undue or unreasonable.

In decisions under section 3(1) and 4 of the ICA, carrier competition has been considered a factor to be weighed in justification of a prima facie discrimination or preference. *Eastern Central Motor Carriers Ass'n.* v. *United States*, 321 U.S. 194 (1944); *Texas and Pacific Ry.* v. *United States*, 269 U.S. 627 (1933); *I.C.C.* v. *Alabama-Midland Ry. Co.*, 168 U.S. 144 (1897).

In the *Eastern Central* case the Supreme Court reviewed a determination by the Interstate Commerce Commission (ICC) upheld by a District Court, that a minimum weight requirement for volume discount, not based on truckload capacity, was both unreasonable and unjustly discriminatory although the requirement was adopted by a motor carrier in order to make its rates competitive with railroad rates. In reversing the lower court's decision, the Supreme Court took the view that both competition and cost of operation are factors which must be taken into consideration in determining whether a discrimination or preference is unlawful. The case is particularly significant because

[33] Section 3, par. (1)
"*Undue preferences or prejudices prohibited.* It shall be unlawful for any common carrier subject to the provisions of this chapter to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

of its recognition of two considerations. First, it recognized that principles evolved in the regulation of railroads in competition only with other railroads have a limited applicability to circumstances where different modes of transportation are in competition with each other. Second, it recognized the inseparability of the ICC's dual function of regulator and coordinator.

The problems presented to the Supreme Court in the Eastern Central case are highly analogous to the instant problem. While ratemaking has been closely tied to cost factors generally, those cost factors are substantially alike to all domestic carriers within an industry. Where cost factors differed between rail carriers and motor carriers and a motor carrier based its rates on competitive considerations, the Supreme Court refused to base its decision as to the reasonableness of those rates on cost factors alone. In water transportation in foreign commerce, cost factors likewise vary between carriers of different national registry. Obviously the differences in costs of operation require carriers to take competition, as well as costs of operation, into consideration in fixing rates.

We consider dual rate contracts to be, in nature, highly analogous to volume discounts; although a shipper does not promise to ship a specific amount of cargo, the expression of his obligation in terms of percentages gives the conference lines as great an assurance of a basic core of cargo on which to rely in planning future vessel requirements as that which would result from a promise to ship a specific amount of cargo within a given period. The parties contract with awareness of the past and probable future needs of the shippers and those needs are identical, whether or not specified. Further, the volume discount nature of the dual rate contract is free from the discrimination in volume contracts contemplated in section 14, Fourth, of the act since the identical discount is available to all shippers, large or small. It was this type of contract which our predecessor, in the *Eden Mining* case *(supra)* took

pains to distinguish in condemning a particular dual rate system.

But even if we should assume that dual rate contracts are not assured volume discounts and if we should assume that such contracts would be violative of the principles of the ICA, we nevertheless must consider decisions under section 2 of the ICA inapplicable here. Problems relating to foreign commerce, as hereinbefore discussed in connection with *Gulf Intercoastal Rates* and *Swayne & Hoyt et al.* v. *United States*, create a peculiar difference in the questions to be considered, within the meaning of *U. S. Navigation Co.* v. *Cunard (supra)*; for regulation of rates in domestic commerce; or the ability to regulate such rates, dispels the need for offsetting competitive ratemaking measures.

By the Transportation Act of 1920, the ICC was granted the power "so to fix rates as to keep in competitive balance the various types of carrier and to prevent ruinous rate wars between them." *New York* v. *United States*, 331 U.S. 284, 348 (1947). No power to fix rates in foreign commerce was granted to this Board. Further, unlike domestic transportation, where a certificate of convenience and necessity must be obtained by a new carrier prior to entry into a service, ocean carriers are entirely free to enter any field of competition. These peculiar differences between domestic and foreign transportation render inapplicable certain principles enunciated under the ICA in connection with domestic transportation, particularly where concerned with problems relating to one mode of transportation alone.

SECTION 14(3)

Petitioners further argue that the Board has no authority to approve a dual rate system under section 15 of the act, since such systems are necessarily unlawful under section 14(3) of the act. They argue, first, that the dual rate system is necessarily retaliatory against non-signing shippers,

and, second, that the absence of the modifying word "unjustly" preceding the word "discriminatory" makes unlawful *any* retaliation by discriminatory methods and not merely those methods which are "unjustly discriminatory." As to the first argument, we cannot improve on an answer previously made to this contention in *Isbrandtsen Co.* v. *North Atlantic Continental Freight Conference et al.*, 3 F.M.B. 235, 242 (1950), where it was said:

" . . . To retaliate is defined in Webster's New International Dictionary, 1945 Unabridged Edition, as 'to return like for like' or 'evil for evil'. Retaliation perhaps connotes the idea of vengeance . . . We cannot view the adoption of the dual rate system or the charging of a higher rate to a shipper who voluntarily declines to give his exclusive patronage as a 'retaliation'. The higher rate cannot be said to be charged as a retaliation for 'patronizing any other carrier.' It is charged because the shipper does not sign the contract, regardless of whether or not he patronizes any other carrier. A non-signing shipper who does not patronize a non-conference carrier is treated as harshly as a non-signing shipper who ships partially or exclusively with such a carrier."

The second argument is equally untenable.[34] As stated in *U. S.* v. *Wells Fargo Express Co.*, 161 Fed. 606, 610 (1908), "It is difficult to conceive of the terms 'discrimination', 'prejudice' or 'disadvantage' as not associated with what is unjust, unreasonable or undue."

From the administrative precedents and judicial decisions hereinbefore discussed and from the legislative history of the act, we necessarily conclude that the dual rate system is not in itself unlawful. The lawfulness or unlawfulness of a particular dual rate system depends directly on the facts adduced in a hearing on the merits of the use of that system in the particular trade and is judged by the standards announced by the Supreme Court in

[34] Assuming as argued by Isbrandtsen that the phrase "unjust discrimination" appearing in sections 15 and 17 of the act renders dual rate systems illegal per se, this argument is totally unnecessary.

Swayne & Hoyt v. *United States (supra)*, repeated here for emphasis:

"In determining whether the present discrimination was undue or unreasonable the Secretary was called upon to ascertain whether its effect was to exclude other carriers from the traffic, and if so, whether . . . it operated to secure stability of rates with consequent stability of service, and so far as either effect was found to ensue, to weigh the disadvantages of the former against the advantages of the latter."

We construe this language, as have our predecessors, as requiring us to consider the reasonableness of the prima facie discrimination[35] against shippers inherent in dual rate systems in the light of the necessity for that discrimination in order to effectuate the Congressional plan for shipping in the foreign commerce of the United States. As previously indicated herein Congress chose the controlled monopoly of the conference system over the alternative of the uncontrolled monopoly naturally resulting from unregulated cutthroat competition among ocean carriers.[36] In *Swayne & Hoyt* v. *United States (supra)*, the Supreme Court recognized *necessity* for the use of a "dual rate system" in order to assure the continued benefits of a regulated conference system as a standard for determining the reasonableness or justice of the prima facie discrimination resulting therefrom, in stating at p. 305:

". . . We think there was evidence from which the Secretary could reasonably conclude that there was little *need* for a contract rate system to assure stability of service." (Emphasis supplied.)

It is inconceivable that Congress in selecting a regulated conference system in preference to unregulated cutthroat competition, would have outlawed a system which in many cases is the sole method by which a conference may retain a sufficient amount of cargo to assure its continued exist-

[35] *Swayne & Hoyt* v. *United States (supra)* at p. 303.

[36] See discussion in 4 Alexander Report, 417-421.

ence. To state that Congress implicitly condemned the dual rate system is to credit Congress with legalizing a conference system without means of self-protection against rate-cutting independent competitors and with little hope of survival.

Obviously Congress did not intend to allow ocean shipping to gravitate into the unregulated monopolistic state sought through the act to be avoided. Such an incongruous result is clearly possible however, if we assume that conferences may not in any circumstances employ dual rates as protection against non-conference competition.

We conclude that the dual rate system is, in itself, lawful, and does not require our disapproval unless, under the facts adduced in a particular case, the system would be unjustly discriminatory and unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, would operate to the detriment of the commerce of the United States, or would be in violation of the act.

In the matter specifically before us, the conference's General Order 76 filing raises two issues of fact, viz: (1) Is the initiation of a dual rate system necessary or required, as a competitive measure, to insure or restore stability of rates and service to shippers in the trade and (2) assuming an affirmative determination of the first question, is the differential or spread reasonable, judged by its probable effect on shippers[37] and on the competitive position of the independent carrier, Isbrandtsen?

We consider the inauguration of a dual rate system to be a necessary competitive measure to offset the effect of non-conference competition in this trade. Non-Japanese conference carriers who, in 1949, carried 88 percent of the total liner cargo moving in the trade, have seen their participation in the total traffic reduced to 25 percent in 1952 because of

[37] The term "shippers" for the purpose of this report includes exporters, importers, or others who may control shipments in this trade.

the severe rate-cutting competition of Isbrandtsen and because of the resumed operations of Japanese carriers. In the same year Isbrandtsen and Japanese-flag lines carried 26 percent and 49 percent respectively of the total liner cargo in the trade. In that year, the last full year under closed rate conditions and the first year of full renewed participation by Japanese-flag carriers, seven[38] conference, non-Japanese lines collectively carried less cargo on 132 sailings than did Isbrandtsen on 24 sailings, despite the fact that Isbrandtsen did not serve the entire range of ports of discharge in this trade and did not offer reefer space or special silk lockers, as did many of the conference vessels.[39]

Institution of a dual rate system would have little effect on the overtonnaged conditions of the trade. Conversely, a reduction in the amount of conference sailings or other solution to the overtonnaging problem would not mitigate the conference's need to meet the competition of Isbrandtsen in order to obtain for its members a greater participation in the cargo moving in the trade. Indications that Isbrandtsen, prior to opening of rates by the conference, had planned to increase its service to three sailings or perhaps four sailings per month leads to the inevitable conclusion that under closed single rates, Isbrandtsen's participation in the trade would be still further increased, most probably at the expense of the non-Japanese conference lines who do not enjoy as an offsetting factor the nationalistic preference of Japanese shippers.

The dual rate system by creating a basic core of cargo on which the conference can rely for the period of the contracts, will eliminate, for that period, the pressure on conference lines to reduce rates to meet Isbrandtsen's lower rate competition and will thereby create greater stability of rates and

[38] Excluding the Westbound service of APL and the Gulf coast service of Lykes.

[39] In this regard, we note that Isbrandtsen's lack of reefer space or silk lockers is voluntary and that Isbrandtsen has published rates for the carriage of silk and silk products in this trade.

service, facilitate forward trading by shippers, and decrease the threat of rate wars.

Generally, we consider the 9½ percent spread between contract and non-contract rates to be reasonable, with minor exceptions as hereinafter noted. The spread is, as to those commodities capable of being carried by both Isbrandtsen and conference vessels, large enough to furnish protection to the conference lines against inducements to shippers offered by Isbrandtsen and small enough to enable Isbrandtsen to remain competitive with the conference. While we find it probable that Isbrandtsen will retain 10 percent or more of the cargo moving in the trade as against the 26 percent carried by it in 1952, yet when compared with the lesser average percentage which will be enjoyed by the conference lines, Isbrandtsen's 10 percent would be at least an equitable share of the trade. The increased share of cargo which will be received by the conference will more than offset any loss of revenue attributable to the 9½ percent discount and will result in reducing fixed unit transportation costs. The cost reduction in turn may result in benefit to both contract and non-contract shippers by enabling the conference lines to reduce freight rates to all shippers.

While dissatisfaction has been voiced by several shippers as to some effects of the spread, shippers generally viewed the spread as not unreasonable.

While a shipper has urged that the spread is too high on commodities of low value in that the 9½ percent differential on those comodities may represent a shipper's margin of profit, of those commodities, only Chirstmas tree ornaments, porcelain, and some bamboo ware were identified, and no alternative spread was suggested. Further, as stated, the shipper indicated that a lower spread on such commodities, while desirable, is totally impractical and does not render an overall spread of 9½ percent unfair or unreasonable.

The fact that Isbrandtsen vessels in this trade discharge only at U. S. North Atlantic ports and do not also call at

U.S. Gulf ports is not of itself overly coercive of and unfair to those shippers who require service to both coasts. First, such shippers could reduce overall shipping costs, in the absence of a preponderantly greater volume of cargo to the Gulf, by shipping via Isbrandtsen vessels to North Atlantic ports and via conference vessels, at non-contract rates, to Gulf ports. While it is true that in such circumstances the non-signing shipper might be at a competitive disadvantage on Gulf shipments, assuming that ocean transportation costs are a significant part of the landed value of the items shipped, yet, on the cargo moving to North Atlantic ports the contract shipper would be at a greater competitive disadvantage as compared with a non-signing shipper who enjoys the customary lower rates of the independent carrier. To realize that the preponderant volume[46] of cargo in the conference trade moves to North Atlantic ports rather than to Gulf ports is to recognize the insignificance of any coercion that might be effected on non-signing shippers by the dual rate system here proposed. Further, there can be no doubt that the Atlantic and Gulf coasts are competitive for the trade of overland points. *Inland Waterways Corp.* v. *Certain Freight Companies*, 1 U.S.M.C. 653 (1937); *In the Matter of Agreement No. 6510*, 1 U.S.M.C. 775 (1938); 2 U.S.M.C. 22 (1939); Johnson & Huebner, Principles of Ocean Transportation, pp. 126, 127 (1929).

We find no coercion on those shippers who require more frequent service than Isbrandtsen's fortnightly sailings in view of Isbrandtsen's announcement, prior to the rate war, of a proposed substantial increase in frequency of its service.

We find no need, however, for any spread on reefer cargo since, as stated, Isbrandtsen vessels are not equipped with refrigerated space and are not, therefore, competitive with conference vessels for reefer cargo.

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[46] An illustrative period of record indicates that Atlantic carryings outnumber Gulf carryings by an approximate 10 to 1 ratio.

As hereinabove indicated, we do not consider the spread or the system to be unjustly discriminatory or unfair as between carriers. Isbrandtsen argues that the system and the 9½ percent spread between contract and non-contract rates are not measures necessary to meet Isbrandtsen's competition and thus are unreasonable. This is true, it is urged, because the conference is able through periodic uniform rate reductions to eliminate Isbrandtsen as a competitor without the necessity for institution of dual rates. We are unimpressed with this argument; even assuming that the conference's more cumbersome rate-making processes are adaptable to such a method of competition, success in eliminating Isbrandtsen through this type of rate warfare would be accomplished at the price of simultaneous elimination of those American-flag lines, present or potential, whose operating costs parallel those of Isbrandtsen. Such a result would be repugnant to the ultimate purposes stated in the title of the act which include "the purpose of encouraging, developing, and creating a naval auxiliary and naval reserve and a merchant marine to meet the requirements of the commerce of the United States with . . . foreign countries." The dual rate system here, on the other hand, is consistent with that purpose. The spread between contract and non-contract rates in the proposed system, based in part on the percentage by which Isbrandtsen most frequently underquotes conference tariff rates will reasonably enable the conference to meet Isbrandtsen's competition *without*, as in the method of uniform conference rate reduction preferred by Isbrandtsen, eliminating a *single* American carrier from the trade.

The dual rate system here proposed will not result in detriment to commerce of the United States. The system will decrease the probability of rate wars and their disastrous consequences in this trade and will benefit shippers by tending to insure a greater measure of stability of rates than has heretofore existed in the postwar period. While Isbrandtsen's share of the traffic may, as stated, be reduced,

we do not anticipate that such increase in conference controlled traffic will result in the traditional evils associated with monopoly. The continued participation of Isbraindtsen in the trade, as well as the existence of strong shipper organizations, stand as a strong deterrent against exorbitant freight rates and other objectionable monopolistic practices. In any event this Board has full power over those rates of conference carriers in foreign commerce which are detrimental to the commerce of the United States.

Various of the provisions of the contract form proposed for use in this trade require particular examination, for as hereinbefore indicated, shipper witnesses in this proceeding were unfamiliar with the contract and had not been consulted by the conference in its preparation.

We consider articles 1 and 6 of the form contract to be unacceptable as presently drafted despite the conference explanation that article 6 constitutes a modification of article 1 and is controlling over the earlier provision. The two articles under any construction are objectionable, because as drafted the receiver under the f.o.b., f.a.s. shipments may obtain contract rates so long as he patronizes exclusively conference vessels but once he ships non-conference, he may not thereafter receive contract rates. This provision is objectionable because such a receiver obtains the benefits of contract rates without signing a shipper contract whereas all other non-signers are charged the full non-contract tariff rates and, therefore, unlike treatment is being accorded non-signers. Such f.o.b. receiver should receive contract rates only if he is a contract signatory.

We approve the contract form insofar as it purports to cover c.i.f. and c. & f. sales. Except as stated below, we disapprove the contract form insofar as it purports to cover f.o.b. or f.a.s. sales. Irrespective of the terms of the sales agreement, in any instance where the contract signer appears as shipper in the bill of lading, such fact alone auto-

matically requires that the shipment move on conference vessels. In the situation where the contract signer appears as shipper in the bill of lading, it is no mere matter of form to say he is the shipper in fact. In c. & f. or c.i.f. sales the problem does not arise, because there the contract signer is in fact the shipper, but in f.o.b. or f.a.s. sales we deem it undesirable to have the answer to this problem turn on the complicated questions of law as to risk of loss or when title passes in determining when a given shipment is or is not covered by the shipper's agreement. We deem it highly desirable that simple tests and standards be applicable.

To this end we consider that the contract should indicate that the person indicated as shipper in the ocean bill of lading shall be deemed to be the shipper. We do not intend, however, to preclude shipment by an exporter as agent for the buyer, where the exporter only renders assistance at the buyer's request and expense, in obtaining the documents required for purposes of exportation.

The significance of articles 1 and 6 is readily apparent when it is realized that over 70 percent of the liner cargo in this trade moves under f.o.b. (or f.a.s.) terms.

In this regard it will readily be recognized that participation by Isbrandtsen in this trade greater than that anticipated by the parties must be forecast, in view of the freedom of the Japanese exporter to sell and ship under f.o.b. terms.

Article 3 incorporates all rules, regulations, terms and conditions in the conference tariff, although such provisions have not been submitted to us along with the conference General Order 76 statement. We will forbid the incorporation of any such provisions which, without our approval, (a) may operate directly or indirectly to change the amount of the spread, or (b) to impose on contract shippers additional requirements not imposed on non-contract shippers.

In article 5, fifty percent of the amount of freight which the shipper would have paid if a given shipment moved via

conference vessel is recoverable by the conference as liquidated damages in the event of shipper breach by patronizing a non-conference carrier. While there is no corresponding provision for liquidated damages to be paid in the event of carrier failure to provide adequate service, in our opinion, no such provision is necessary. The failure to specify the amount of damages in such circumstances is, in our view, nothing more than a recognition by the parties that damages may readily be ascertained, in the event of conference breach, on submission of the matter to arbitration, in accordance with article 10.

While a prominent shipper group recommended that liquidated damages in the event of shipper breach be limited to 20 percent of the freight which would have been earned, we have no basis for finding that a 50 percent payment would be a penalty, rather than an assessment of liquidated damages, since we have not been sufficiently apprised here of the relationship between dead freight and tariff rates.

In summary:

Applying the tests of *Swayne & Hoyt, Ltd.* v. *United States (supra)* and balancing the foreseeable advantages of the proposed dual rate system against the foreseeable disadvantages, we find that the prima facie discrimination against shippers and the increased tendency toward monopoly of service are outweighed by the benefits to be derived from the system. Those advantages we find to be (a) greater stability and uniformity of rates than has existed since the outbreak of the rate war, and the resultant benefit to shippers and receivers in this trade, (b) the ability of the conference carriers through reduced unit transportation costs to provide lower rates to all shippers and/or to put improved, more efficient tonnage on berth. While the possible reduced utilization of Isbrandtsen's services by shippers is, to some extent, disadvantageous to the efforts of shippers to have rates maintained at a reasonably low level, yet the continued

existence of Isbrandtsen as an effective competitor and the existence of strong shipper groups insures conference consideration of shipper needs and desires. In this regard, it must be noted, that Isbrandtsen's participation in this trade, prior to the outbreak of the rate war, had little practical effect on the level of rates, since conference rate increases were consistently followed by Isbrandtsen rate increases. This phenomenon is largely explained by the fact that the conference, however keenly aware of Isbrandtsen's rate competition, avoided rate reductions until March 1953 in the hopes that a rate war, by uniform rate reductions or by open rates, could be avoided by institution of a dual rate system. Put otherwise, the conference, by failing to reduce rates uniformly ,elected to realize high revenues from a lesser amount of cargo over lower revenues from a greater amount. The economic pressure to reduce rates, however, remained.

Aside from their opposition to the proposal to initiate dual rates, interveners have argued that the relationship between the conference and the Trans-Pacific Freight Conference of Japan has amounted to effectuation of an unapproved agreement between carriers in violation of section 15 of the act. While it is true that identical actions have been taken at similar times, that the conferences meet at the same address, and that the membership for the greater part is common, we have been presented with no evidence tending to show the existence of any agreement, express or implied, which, while unapproved, falls within the prohibitions of section 15.

The conference has not considered its General Order 76 filing as a filing for approval under section 15 of the act. The statement was filed, however, prior to the decision of the Court of Appeals for the District of Columbia Circuit in *Isbrandtsen Co., Inc.* v. *United States et al.*, 211 F. 2d 51 (1954) where that court held that the agreement of this conference to initiate a dual rate system had never received

our approval or the approval of our predecessors. For this reason we must consider nunc pro tunc the statement to be a filing for approval under section 15 of the act. To hold otherwise would be to treat this entire proceeding as a nullity.

We find:

(a) The application of the conference to initiate a dual rate system on non-refrigerated cargo to move in the trade from Japan, Korea, and Okinawa to United States North Atlantic Coast and Gulf ports is approved, since we have not found the proposed system to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers or ports, or between exporters from the United States and their foreign competitors, likely to operate to the detriment of the commerce of the United States, or in violation of the act. The approval granted is contingent on conference amendment of the proposed agreement with shippers to conform with ~~our opinion~~ herein.

(b) The conference proposal to charge dual rates on refrigerated cargo moving in the trade between Japan, Korea and Okinawa to United States Gulf coast and Atlantic coast ports is disapproved as unjustly discriminatory and unfair as between shippers.

(c) No agreement between this conference and the Trans-Pacific Freight Conference of Japan in violation of section 15 of the act has been established.

Our approval of the conference's application to institute a dual rate system in this trade is effective commencing on January 1, 1956.

A. J. Williams
Secretary

December 12, 1955

RULE 236 OF GENERAL ORDER 76

(Title 46-Shipping-Chapter II-Federal Maritime Board, Maritime Administration, Department of Commerce-Part 236-Steamship Conferences Using Contract/Non-Contract Rates-Code of Federal Regulations.)

Whereas, the Federal Maritime Board published in the Federal Register on July 31, 1952 (17 F. R. 7020) a notice of proposed rule of procedure pertaining to the use of contract/non-contract rates by steamship conferences to become effective as of a date to be specified in such rule if adopted by the Board; and

Whereas, the Board granted interested parties an opportunity to submit written statements and comments on said rule within 30 days of the publication of said notice, and thereafter at the request of interested parties extended the time therefor until September 19, 1952; and

Whereas, the Board granted interested parties, at their request, an opportunity to be heard at an oral argument before the Board on October 16, 1952; and

Whereas, after consideration of the written statements and comments submitted and oral argument as aforesaid, and in the light thereof, the Board has adopted the rule of procedure hereinafter set forth; and

Whereas, in view of the time and opportunity to be heard afforded all interested parties, and the necessity for prompt and uniform treatment of steamship conferences using contract/non-contract rates, the Board finds that it is in the public interest to make said rule effective upon the publication thereof.

Now, therefore, it is hereby ordered, that pursuant to section 15 of the Shipping Act, 1916 (46 U.S.C. 814), section 204 of the Merchant Marine Act, 1936, as amended (46 U.S.C. 1114), and sections 3 and 4 of the Administrative Procedure Act (5 U.S.C. 1002, 1003), the following rule of

procedure shall be effective as of the date of publication in the Federal Register:

1. Steamship freight conferences having in effect contract/non-contract rates on the effective date of this rule shall file with the Federal Maritime Board within 90 days after the effective date of this rule a statement containing:

(a) The date when contract/non-contract rates were first established by the conference;

(b) The amount of the spread or differential between current contract/non-contract rates stated in terms of percentages or dollars and cents;

(c) The reasons for the use of the current contract/non-contract rates in the particular trade involved, and the basis for the current spread or differential between such rates; and

(d) Copies of the form of all contracts pertaining to such current rates.

2. Steamship freight conferences now or hereafter having in effect contract/non-contract rates shall file with the Federal Maritime Board at least 30 days prior to initiating any increase in the spread or differential between such rates, a statement containing:

(a) The amount of increase in the spread or differential and the total proposed spread or differential in terms of percentages or dollars and cents;

(b) The effective date;

(c) The reasons for the increase in the spread or differential; and

(d) Copies of the form of any changed contract provisions relating to such increase in spread or differential.

As used in this paragraph 2, an "increase in the spread or differential" shall be deemed only to mean an increase

in the percentage of a spread or differential between rates if such spread or differential has been established in terms of percentages, or an increase in the dollars and cents amount of the spread or differential if such spread or differential has been established in terms of dollars and cents.

3. Steamship freight conferences proposing to establish contract/non-contract rates to become effective after the effective date of this rule shall file with the Federal Maritime Board at least 30 days prior to the initiation of such rates, a statement containing:

(a) The amount of the spread or differential in terms of percentages or dollars and cents;

(b) The effective date;

(c) The reasons for the use of contract/non-contract rates in the particular trade involved, and the basis for the spread or differential between such rates; and

(d) Copies of the form of all contracts pertaining thereto.

Contract/non-contract rates for a commodity as to which such rates have previously been in effect and discontinued shall not be deemed to be newly established contract/non-contract rates within the meaning of this paragraph 3 if such contract/non-contract rates are again made effective by the conference without increase in spread or differential and within 12 months after discontinuance.

4. Upon a showing of good and sufficient cause, the time within which to file the foregoing statements may be

shortened or extended, or such other action taken with respect thereto, as the Board may consider to be in the public interest and not detrimental to the commerce of the United States.

[*A copy of the Exclusive Patronage Contract was attached to the Petition for Review. It is printed herein as Exhibit J attached to the Statement of the Conference filed under General Order 76.*]

Order

At a Session of the FEDERAL MARITIME BOARD, held at its office in Washington, D. C., on the 20th day of December A.D. 1955.

No. 730

IN THE MATTER OF THE STATEMENT OF JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE FILED UNDER GENERAL ORDER 76

This case being at issue and having been duly heard and submitted by the parties and full investigation of the matter and things having been had and the Board on December 12, 1955, having made and entered of record a report stating its decision and conclusions thereon, which report is hereby referred to and made a part hereof;

It is ordered, That the Agreement embodied in and constituted by the aforesaid Statement filed by the Japan-

Atlantic and Gulf Freight Conference as aforesaid, be, and the same is hereby, in all respects, approved under the provisions of section 15 of the Shipping Act, 1916, as amended, excepting that said contract system shall not apply to shipments which are made on an F.O.B., F:A.S., or ex godown basis or to the transportation of cargoes in refrigerated compartments; and to that end;

It is further ordered, That as a part of the said contract system, the shipper's contract to be employed by said Japan-Atlantic and Gulf Freight Conference shall be in the form of Exhibit J attached to and constituting a part of the aforesaid Statement, modified as follows:

A. Article 1 thereof shall be modified to read as follows:

"1) The Shipper agrees to forward or to cause to be forwarded by vessels of the Carriers all shipments, other than cargoes to be transported in refrigerated compartments (reefer cargo), made directly or indirectly by him, his agents, subsidiaries, associated or parent companies, from Japan, Korea and Okinawa to United States Gulf ports and Atlantic Coast ports of North America, whether such shipments are made C.I.F., or C. & F.; provided, that for all purposes of this agreement, the person indicated as shipper in any ocean bill of lading shall be deemed to be the shipper of the goods described in the bill of lading."

B. Article 3 shall be stricken therefrom.

C. Article 6 shall be stricken therefrom.

D. The remaining paragraphs shall be numbered consecutively, and

It is further ordered, That the approval hereby granted shall be effective January 1, 1956, at 12:00 noon Eastern Standard Time.

By the Board.

A. J. Williams
Secretary

Order

At a Session of the FEDERAL MARITIME BOARD, held at its offices in Washington, D. C., on the 10th day of January A.D. 1956

No. 730

IN THE MATTER OF THE STATEMENT OF JAPAN-ATLANTIC AND GULF FREIGHT CONFERENCE FILED UNDER GENERAL ORDER 76.

Whereas, This matter has been at issue, has been duly heard and submitted by the parties, and full investigation of the matter has been had, and the Board, on December 12, 1955 has made and entered of record a report stating its decision and conclusions thereon, which report is hereby referred to and made a part hereof; and

Whereas, The Board, by order served on December 21, 1955, approved under the provisions of section 15 of the Shipping Act, 1916, as amended, the Agreement embodied in and constituted by the aforesaid statement filed by the Japan-Atlantic and Gulf Freight Conference with exceptions as specified in said order; and

It appearing, That the exceptions to the aforesaid approval granted in said order require clarification and for good cause appearing;

It is ordered, That the order of the Board heretofore served in this Docket on December 21, 1955 be, and it is hereby, superseded and cancelled; and

It is ordered, That the Agreement embodied in and constituted by the aforesaid Statement filed by the Japan-Atlantic and Gulf Freight Conference as aforesaid, be, and the same is hereby, in all respects, approved under the provisions of section 15 of the Shipping Act, 1916, as amended,

excepting that said contract system shall not apply to shipments which are made on an F.O.B., F.A.S., or ex godown basis unless the person, whether seller or buyer, named as shipper in the ocean bill of lading is a contract signatory, or to the transportation of cargoes in refrigerated compartments; and to that end

It is further ordered, That as a part of the said contract system, the shipper's contract to be employed by said Japan-Atlantic and Gulf Freight Conference shall be in the form of Exhibit J attached to and constituting a part of the aforesaid Statement, modified as follows:

A. Article 1 thereof shall be modified to read as follows:

"1) The Shipper [contract signatory] agrees to forward or to cause to be forwarded by vessels of the Carriers all shipments, other than cargoes to be transported in refrigerated compartments (reefer cargo), made directly or indirectly by him, his agents, subsidiaries, associated or parent companies, from Japan, Korea and Okinawa to United States Gulf ports and Atlantic Coast ports of North America, whether such shipments are made C.I.F., or C. & F., if the Shipper is the Seller or are made F.O.B., F.A.S., or ex godown if the Shipper is the Receiver; provided, that for all purposes of this agreement, the person indicated as shipper in any ocean bill of lading shall be deemed to be the shipper of the goods described in the bill of lading."

B. Article 3 shall be stricken therefrom.

C. Article 6 shall be stricken therefrom.

D. The remaining paragraphs shall be numbered consecutively. This order shall be effective on the date of issuance.

By the Board.

(SEAL)

A. J. Williams
Secretary

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISBRANDTSEN COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME BOARD,
Respondents,

No. 13027

and

JAPAN-ATLANTIC and
GULF FREIGHT CONFERENCE ET AL,
Intervenor Respondents

Motion for the Remanding of Order To the Federal Maritime Board

Petitioner, herein, Isbrandtsen Company, Inc., hereby moves this Court to remand the Order of the Federal Maritime Board, dated January 10, 1956, served on January 11, 1956 (which is attached hereto as Exhibit A) to the Board for a proper recitation of the circumstances and reasons prompting it and for proper findings of fact pursuant to the requirements of the Administrative Procedure Act.

In support of this Motion, Petitioner represents:

1. The circumstances surrounding the present administrative proceeding before the Federal Maritime Board are an incredible commentary on the Board's method of conducting such proceedings, required to be held pursuant to the provisions of the Administrative Procedure Act. Some of these circumstances are as follow:

A. About one (1) month prior to the Board's original decision or Report of December 12, 1955, Petitioner herein had requested the Chairman of the Board to stay voluntarily the effectiveness of any Order that the Board might enter in this and other exclusive patronage contract rate proceedings, then pending before it, for thirty (30) or forty-

five (45) days after such Report or Order had been issued so as to afford Petitioner herein a reasonable and sufficient time to proceed into Court, if necessary.

B. Notwithstanding the assurances of the Board's Chairman that such request would be considered by the Board, the Board's Report was served on December 14, 1955, and received by mail by Petitioner on the following day, and purported to "approve" the exclusive patronage contract rate system effective January 1, 1956, thus affording only a brief time interval for the convenience of the Conference to make certain amendments in the exclusive patronage contract as required by the Board's Report. The briefness of this time interval was further complicated by the fact that the Report was issued prior to the then ensuing Holiday Season.

C. Although the Board's Report contained no Order, nor did it state that any Order would ever be issued, it was necessary for Petitioner to proceed immediately into this Court in order to prevent irreparable and substantial injury from being done to it, in view of the purported "approval" of the exclusive patronage contract rate system, which was to have become effective on January 1, 1956.

D. Petitioner filed its Petition to Review and Application for Interlocutory Injunction and Temporary Stay with this Court on December 19, 1955, and on the same day served upon the Board these papers and a letter addressed to the Board calling the Board's attention to the deficiency in said Report in the failure to attach or refer to any Order. A copy of Petitioner's letter to the Board, dated December 19, 1956, is attached hereto as Exhibit B.

E. In the said letter of Petitioner to the Board, dated December 19, 1955, Petitioner also requested that upon submittal of the "conference amendment" of the exclusive patronage contract, as called for by the Board's Report, Petitioner have the opportunity to examine it and to be present at any conferences between the Board or its staff

and Conference counsel, as Petitioner and other interested parties were entitled to, under the Administrative Procedure Act and under the Board's own General Order 76.

F. Notwithstanding this formal request of Petitioner, and in contravention of the provisions of the Administrative Procedure Act and its own General Order 76, the Board by its Order, entered on the very next day and served on December 21, 1955 (a copy of which is attached hereto as Exhibit C), sought to short circuit the right of Petitioner and others to inspect and be heard on the amendment to the exclusive patronage contract with shippers, by the devise of the Board's own writing of such exclusive patronage contract which if had "approved".

G. This unilateral action of the Board in its Order, served on December 21, 1955, was a representation of the Board's zeal to protect and to espouse the Conference's interests at all costs, and was most certainly prompted by Petitioner's letter to the Board of December 19, 1955. Despite the fact that the Board's Report had stated that the amendment to the exclusive patronage contract would be made by the *Conference*, the Board's first Order, served seven days after the date of the Report and immediately after Petitioner's letter of December 19, 1955, purports to contain the Board's own effort to accomplish this amendment. So far as Petitioner is aware, neither the Conference (at that time) nor any other party to the Administrative Proceeding, required to be held pursuant to the provisions of the Administrative Procedure Act, had ever seen, much less had a fair hearing on, such modification of the proposed exclusive patronage contract prior to the service of said Order.

H. In the original Report of the Board (page 47 of the mimeographed copy thereof), the Board stated that, "we disapprove the contract form insofar as it purports to cover F.o.b. or F.a.s. sales." The first Order of the Board served on December 21, 1955 orders (sic.) the "approval" of the exclusive patronage contract rate system of the Conference, "excepting that said contract system shall not apply

to shipments which are made on an F.O.B., F.A.S., or ex godown basis or to the transportation of cargoes in refrigerated compartments."

I. The order served by the Board on January 11, 1956, which is the subject of this motion, states that the exclusive patronage system shall not apply to F.O.B. and F.A.S. shipments, etc., "unless the person whether seller or buyer, named as shipper in the ocean bill of lading is a contract signatory". In order to effectuate this new amendment to its Order, whatever such confused language may mean, the Board also makes certain further amendments in the exclusive patronage contract it has written.

J. Such new order of the Board attempts to accomplish a major and most fundamental change in the exclusive patronage contract, and there are no findings whatsoever in its original Report to support this new conclusion. The previous filings of Petitioner to this Court and the affidavits of Matthew S. Crinkley have proceeded on the assumption that the exclusive patronage contract rate system, as "approved" by the Board, would not apply to F.O.B. or F.A.S. shipments, as the Board's Report and first Order had stated. The essential importance of this matter is indicated, for example, on page 3 of Mr. Crinkley's Supplementary Affidavit, where he states that the most Petitioner could hope to carry once the exclusive patronage contract should go into effect would be "about 500 tons from importers in the United States, who buy on an F.O.B. basis, ..." Mr. Crinkley's statement was obviously based on the assumption that the exclusive patronage contract rate system would not be allowed to apply to F.O.B. or F.A.S. shipments. By its new Order, however, the Board apparently gives the Conference the go-ahead signal to use its coercive powers upon consignees located in the United States, so that any carryings Petitioner would thereafter get would not only be *de minimus*, they would be virtually non-existent.

K. Said supplementary Order of the Board recites that,

"*It appearing*, That the exceptions to the aforesaid approval granted in said order require clarification and for good cause appearing;"

Such Order nowhere states who has shown the "good cause" or what the reasons might be for this drastic amendment. Petitioner believes that such amendment was prompted by certain *ex parte* representations and arguments made by the Conference in private conferences and conversations with the Board, none of which representations or arguments are recited or mentioned in such supplementary Order, and none of which were ever the subject of a formal notice given to Petitioner and to the other parties to the administrative proceeding.

2. The Federal Maritime Board cannot, by its strange and unprecedented method of issuing post mortem orders, after the issuance of its Report, avoid the statutory requirement of making proper findings. The matter of the Conference proposal to control F.O.B. and F.A.S. shipments under the exclusive patronage contracts was a material issue in the administrative proceeding before the Board. Such matter was the subject of several proposed findings, conclusions, and exceptions to the Recommended Decision of the Examiner, which were filed by all parties. Every party to the administrative proceeding, including the Board's own counsel, except the counsel for the Conference, opposed the coverage of F.O.B. and F.A.S. shipments by the exclusive patronage contract. Presumably, the Board in its original Report and in its first Order ruled that the exclusive patronage contracts could not legally reach so far. Now, by its supplementary Order, issued eleven (11) days after even the effective date of the Board's purported "approval", the Board would change its prior holding and give the Conference the all-inclusive and completely predatory power it requested.

This invocation of the star chamber methods cannot be sanctioned or permitted by the Administrative Procedure Act. In this respect, section 8(b) of that Act provides:

"The record shall show the ruling upon each such finding, conclusion, or exception presented. All decisions (including initial, recommended, or tentative decisions) shall become a part of the record and include a statement of (1) findings and conclusions, as well as the reasons or basis therefor, upon all the material issues of fact, law, or discretion presented on the record."

This provision of the Administrative Procedure Act applies to all Orders "required by statute" to be determined on the record after opportunity for an agency hearing.

3. There can be no doubt that "Findings and conclusions must include all the relevant issues presented by the record." Sen. Doc. No. 248, 79th Cong., 2d Sess. pp. 210, 211 (1946). There were many issues presented at the hearing concerning the patent unfairness of controlling F.O.B. and F.A.S. shipments. The major objection to such control is that it would provide the Conference with the *immediate* power to monopolize *100* per cent. of the cargo in the trade. It was developed at the hearing that it would be fundamentally unfair for the Conference, domiciled in Japan, to attempt to control F.O.B. or F.A.S. consignees located in the United States. Many of these elements of unfairness are clearly apparent on the face of the exclusive patronage contract. For example, Article 10 of the proposed exclusive patronage contract, as approved by the Board, would subject American consignees located in New York, or in other parts of the United States to the following contractual provision:

"Any controversy, claim or dispute arising out of or relating to this agreement which cannot be settled amicably shall be settled by arbitration in Tokyo, Japan."

4. The Board's Report and its Orders are fundamentally deficient in disclosing or stating any findings or reasons which would support the amendment in its supplementary Order that F.O.B. and F.A.S. shipments may be covered by the exclusive patronage contract. Any arguments which have been presented by Conference counsel *ex parte* to the

Board have not been the subject of any disclosure to Petitioner. Petitioner is protected from such procedural unfairness. In this respect, section 7(c) of the Administrative Procedure Act, concerning "Hearings" provides, *inter alia*, that:

"Every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts."

Section 5(b) of that Act provides that every agency must afford *all* interested parties the opportunity for:

"(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit . . . "

Certainly neither "time" nor the "public interest" could work to deprive Petitioner of these statutory rights and elemental considerations of fairness in this case. The Conference has furthermore by its Stipulation filed with this Court on December 28, 1955, agreed not to put the exclusive patronage contract rate system into effect until after March 1, 1956.

5. The supplementary Order of the Board is fundamentally defective on its face. Administrative Orders must like the injunction order of a Court, state with reasonable specificity the acts which may be done and which cannot be done, and such Orders must be reasonably related to the findings upon which they rest. *NLRB v. Express Publishing Co.*, 312 U.S. 426 (1941); *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). In the instant case, the Federal Maritime Board, by its supplementary Order, is attempting to shift to this Court the factual questions and issues which must necessarily be involved in the proposed amendment. An administrative agency cannot avoid its statutory responsibility to make findings of fact in this way. As stated by the Supreme Court in *FTC v. Morton Salt Co., supra*, 54,

"The effective administration of the Act, insofar as the Act entrusts administration to the Commission, would be greatly impaired if, without compelling reasons not here present, the Commission's cease and desist orders did no more than shift to the courts in subsequent contempt proceedings for their violation the very fact questions of injury to competition, etc., which the Act requires the Commission to determine as the basis for its order."

It is the basis for the Board's supplementary Order which is now completely lacking to Petitioner, and to which Petitioner should be entitled in order to proceed with its instant Petition to Review and its Application for Injunction Relief.

Wherefore, Petitioner, Isbrandtsen Company, Inc., respectfully moves that this Court remand to the Board the aforementioned Order of January 10, 1956 and that the Board be directed to recite the circumstances and reasons prompting it and to state the findings of fact which the Board considers would support it.

January 14, 1956

/s/ John J. O'Connor
John J. O'Connor
Attorney for Petitioner
Washington Building
Washington 5, D. C.

EXHIBIT B

Law Offices

JOHN J. O'CONNOR

29 Broadway
New York 6
BOwling Green 9-2348

Washington Building
Washington 5, D. C.
REpublic 7-1080
Washington, D. C.

December 19, 1955

Federal Maritime Board
441 G Street, N.W.
Washington 1, D. C.

Dear Sirs:

As you know, Isbrandtsen Company, Inc., has filed in the United States Court of Appeals for the District of Columbia Circuit this morning, a Petition to Review your Report of December 12, 1955, purporting to authorize the Japan-Atlantic and Gulf Freight Conference to institute its exclusive patronage contract dual rate system effective January 1, 1956; we have also filed an application for an Interlocutory Injunction and a request for an immediate and Temporary Stay pending the Hearing and determination of such application.

You will appreciate that it was necessary for us to move rapidly into Court in order to prevent irreparable injury of Isbrandtsen. An adjudicatory decision by an administrative agency is ordinarily accompanied by an order, unlike your Report of December 12, 1955. Because of the shortness of time involved, it was necessary for us to assume after inquiry that your omission of an order was inadvertent.

Since your Report was not served until December 14, 1955, and did not reach me by Registered Mail until the following day, there were at most a total of sixteen (16) days, assuming your date of January 1, 1956, contemplated Washington time, five (5) of which are Saturdays, Sundays and

Holidays when neither the Board nor the Courts would be open. The Conference, however, has always emphasized the fact that it is "domiciled" in Japan and, as the Board may take official notice, the time in Tokyo is more than one (1) and one-half (½) days earlier than Washington, D. C., time. If the assumption should be made that your effective date of January 1, 1956, meant Tokyo time, we would have had only nine (9) business days to prepare our papers and receive a determination on relief requested from the Court.

I assume that in fixing the effective date of January 1, 1956, you denied my informal request to the Chairman that any Report or Order you issued in the dual rate cases contain a provision that the system could not go into effect for thirty (30) or forty-five (45) days after the issuance of such report or order, so as to give us time to go into Court. I now make a formal request for such action in Docket Numbers 743, 725 & 751 in the event that Board action there should be adverse to us.

We have promptly informed the Conference of our filing in Court this morning. The Conference Counsel, Mr. Turk, has stated to me that the Conference would not put the System into effect until on or after March 1, 1956. I have agreed, upon his request, therefore, not to press for a Hearing and determination on our application for Interlocutory Injunction and Temporary Stay, provided we can agree to a Stipllaton which he requested I submit to him.

Since the time interval between service of your Report and the effective date of your authorization was so short and would have necessitated major changes in the exclusive patronage contract of the Conference, it has occurred to me that you may have contemplated that the Conference would make these changes unilaterally or after ex parte Conferences with the Board or its staff. As you know these are matters of the most vital concern to Isbrandtsen, concerning which we were the party presumably most directly responsible for the changes you suggest, and I must insist on our right to review such amendments and to be apprised of and be present at any discussions between Conference Coun-

sel or Representatives and the Board and its staff. By making this request, I, in no way intend to imply, tacitly or otherwise, that I agree with the Board's method—if such is the intention—of accomplishing the required amendment to the exclusive patronage contract. I believe that the amendment contemplated is new and requires public notice and publication in the Federal Register just as any other new filing of an agreement.

I would appreciate your prompt reply.

Respectfully,

/s/ JOHN J. O'CONNOR.

O/mj
Copies to all Attorneys on Record.

Filed January 24, 1956

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ISBRANDTSEN COMPANY, INC.,
Petitioner,

v.

UNITED STATES OF AMERICA and
FEDERAL MARITIME BOARD,
Respondents,

and

JAPAN-ATLANTIC and
GULF FREIGHT CONFERENCE ET AL,
Intervenor Respondents.

No. 13027

Answer of Respondent Federal Maritime Board to Petitioner's Motion for Remanding of Order to the Federal Maritime Board

In answer to petitioner's Motion for remanding of "Order to the Federal Maritime Board" respondent Federal Maritime Board states:

The motion is without substance and appears to have been interposed for purposes of delay. It should be denied. By the motion petitioner asks first that the matter be remanded to the Board so that the Board may recite to petitioner "the circumstances and reasons prompting" the January 10th Order of the Board which was issued in conformance with its 51 page report. We believe such a request to a Board or Court to be unprecedented. But even if petitioner were entitled to such a request, it is unnecessary to remand the Order as we here, in this answer, do recite such circumstances and reasons in detail for the benefit of the Court. The second request of the motion is to remand for proper findings of fact pursuant to the Administrative Procedure Act. We can only conclude that this request must have resulted from petitioner's failure to examine the Board's Report.

It is our purpose in this answer, after presenting a brief chronology of events with respect to the Report and Orders, to first state the charges made by petitioner and then answer them point by point.

The Board's report was issued on December 12, 1955, and served on December 14, 1955. The report specifically stated it was not to go into effect until January 1, 1956. On December 21, 1955, the Board served an order which by its own terms was not to go into effect until January 1, 1956, and on January 10, 1956, the Board issued a clarifying order which superseded and cancelled its order of December 21, 1955.

1. Petitioner's representations in numbered paragraphs 1(A-G) charge that the Board did not accede to petitioner's informal request, made one month before the Board's report issued, for a temporary stay of from thirty to forty-five days after such report, or order would issue; that the Board did not issue an order with its report of December 12, 1955; and that the Board when it issued its order of December 21 and January 10 did so in violation of the

Administrative Procedure Act, because it failed to consult with petitioner before the issuance of said orders.

a. Respondent is at a loss to understand how the fact that when the Board issued its report and stay, it only partially granted the informal request made by petitioner to the Chairman about a month before the report was issued is in any way violative of the Administrative Procedure Act. It is manifest that a request for a stay, even a formal one timely made after the order was issued, does not as a matter of right stay the action of a court or an agency. Under Rule 16(c) Rules of Practice and Procedures of the Federal Maritime Board, and Rule 10(d) Administrative Procedure Act, the grant of a stay from any administrative action is always at the discretion of the agency.

The Board's report issued on December 12, 1955, by its own terms did not become effective until January 1, 1956. Thus, as the report could have been made effective on the date of issuance, petitioner was given the unusual concession of 19 days in which to prepare for judicial review. In any event, petitioner was not harmed by the Board's reluctance to grant him his entire informal request for a 30 to 45 day stay, as the Conference has voluntarily stated it could not put the contract rate system into effect until March 1, 1956.

b. There is no requirement that makes it incumbent upon an agency or a court to attach an order or judgment simultaneously with its report or opinion, as petitioner seems to claim in Paragraph 1C. This is particularly so in this case where the Board's report of December 12 was not made effective until January 1.

c. Petitioner's representations in paragraphs 1 (E, F, and G) that he had a right to be heard in the promulgation of the Board's order of December 21, 1955, are baseless. No applicable statute or rule of the Board gives a party a right to participate in the promulgation or issuance of

a Board order, especially an order made after full evidentiary hearings. The power to issue orders is particularly within the province of the agency. Moreover, petitioner's representations in paragraph 1(D) wherein he chastizes the Board for its failure to attach an order to the report of December 14, 1955, is completely inconsistent with the representations made in paragraph 1(G), where he claims the unilateral action of the Board in issuing its order of December 21, 1955, is violative of the Administrative Procedure Act. If the Board had attached an order to the report of December 14, 1955, it would, of necessity, have to have been issued by the unilateral action of the Board. This, we believe, points up the fact that the entire motion is wholly lacking in substance.

An administrative agency has the inherent power to amend an order without a hearing, to remove ambiguity, where as in this case the subject matter of the amendment was within the original inquiry on which evidence was introduced at the hearing. *Pennsylvania R. Co.* v. *U. S.*, 288 Fed. 88, 1923 (3 judge court). If, as petitioner claims, notice and hearing is a prerequisite to the issuance of an order which itself resulted from a hearing, one wonders how an order could ever be issued.

This Board has been granted broad statutory authority by Section 25 of the Shipping Act of 1916 (46 U.S.C. 824) to "*reverse*, *suspend* or modify, upon such notice and in such manner as it deems proper, any order made by it." Surely if the Board has such complete discretion to even *reverse* or *suspend* an order it may without question simply clarify its previous order without notice or hearing, especially where, as here, no detrimental reliance or action has been taken on its previous order.

2. The remaining paragraphs of petitioner's motion represent that the Board's order of January 10, 1956, accomplished a major change in its order of December 14, 1955; that the subsequent and clarifying order was not

supported by the findings of the Board's report; that the failure to make these findings improperly shifted to this Court the factual questions and issues; that affidavits filed on Petitioner's behalf before this Court were based on the Board's original order, and that the latter order of the Board was prompted by ex parte representations and arguments made by the Conference to the Board.

a. The Board's order of January 10, 1956, simply clarifies their original order. ~~There~~ is no fundamental change or departure between the two orders. The first order of the Board does not, as petitioner erroneously asserts, unqualifiedly except from the contract-rate system all shipments made on an f.a.s., f.o.b. basis; nor does the second order unqualifiedly except from the system shipments made on this basis, nor does the report. The purpose of the second order was to clarify the first order, and to remove any uncertainty as to its affect on f.o.b., f.a.s. shipments in the light of the Board's report.

b. The first order, while based upon the report of the Board was not as explicit on the f.o.b., f.a.s. question as the second order. The amended order directly and specifically carries out what the Board had expressed on the subject on pages 46 and 47 of its report, which we quote in full.

"Various of the provisions of the contract form proposed for use in this trade require particular examination, for as hereinbefore indicated, shipper witnesses in this proceeding were unfamiliar with the contract and had not been consulted by the conference in its preparation.

"We consider articles 1 and 6 of the form contract to be unacceptable as presently drafted despite the conference explanation that article 6 constitutes a modification of article 1 and is controlling over the earlier provision. The two articles under any construction are objectionable, because as drafted the receiver under the f.o.b., f.a.s. shipments may obtain contract rates so long as he patronizes exclusively conference vessels but once he ships non-conference, he may not thereafter receive contract rates. This

provision is objectionable because such a receiver obtains the benefit of contract rates without signing a shipper contract whereas all other non-signers are charged the full non-contract tariff rates and, therefore, unlike treatment is being accorded non-signers. *Such f.o.b. receiver should receive contract rates only if he is a contract signatory.*

"We approve the contract form insofar as it purports to cover c.i.f. and c. & f. sales. *Except as stated below*, we disapprove the contract form insofar as it purports to cover f.o.b. or f.a.s. sales. Irrespective of the terms of the sales agreement, *in any instance where the contract signer appears as shipper in the bill of lading, such fact alone automatically requires that the shipment move on conference vessels.* In the situation where the contract signer appears as shipper in the bill of lading, it is no mere matter of form to say he is the shipper in fact. In c. & f. or c.i.f. sales the problem does not arise, because there the contract signer is in fact the shipper, *but in f.o.b. or f.a.s. sales we deem it undesirable to have the answer to this problem turn on the complicated questions of law as to risk of loss or when title passes* in determining *when a given shipment is or is not covered by the shipper's agreement.* We deem it highly desirable that simple tests and standards be applicable.

"*To this end we consider that the contract should indicate that the person indicated as shipper in the ocean bill of lading shall be deemed to be the shipper.* We do not intend, however, to preclude shipment by an exporter as agent for the buyer, where the exporter only renders assistance at the buyer's request and expense, in obtaining the documents required for purposes of exportation." (Emphasis added)

We respectfully invite the Court to compare this language with that of the order sought to be remanded. The above language from the report constitutes findings of fact on the qualification of f.o.b., f.a.s. shipments under the contract, and clearly demonstrates that this subject was thoroughly and exhaustively explored at the hearings. It is a complete answer to petitioner's claims that f.o.b., f.a.s. provisions of the order are not supported by findings. It goes without saying that it is also a complete refuta-

ion of petitioner's surprising categorical statement (pp. 4 and 5) that by the Board's report the exclusive patronage contract system should not apply to f.o.b., f.a.s. shipments.

The fact that the Board did not preface its statements on pages 46 and 47 with the caption "Findings of Fact" is immaterial. Formalized findings are not necessary. *New York Central & H.R.R. Co.* v. *Murphy, et al.*, 224 F. 407, 408 (1915) It is sufficient if the findings are set forth in any of the statements of the report. *Leigh Valley R. Co.* v. *American Hay Co.*, 219 Fed. 539 (1914) Nor are findings required in the Board's order. *Carolina Aluminum Co.* v. *Federal Power Commission*, 97 Fed. (2) 435, 436 (1938)

b. Petitioner also complains that it has had no opportunity to be heard on the extent to which f.o.b. or f.a.s. shipments should be included in the shipper's contract. The full record is not yet before this Court. When it is filed the Court will have the opportunity of noting the extent to which the contents of the dual rate contract and the problems relating to f.o.b., f.a.s. shipments were explored. But it is patent that the Board could not have commented so fully on the subject in the quoted portion of its report and elsewhere (for example, pp. 16, 17 and 18) without the parties having been heard fully on the subject. In a proceeding as extensive as this has been it hardly need be pointed out that this particular petitioner would not have remained silent on such a major issue. The *Express Publishing* case, and *Morton Salt* case, cited on page 8, of petitioner's motion, enunciate sound principles of law, but they are not applicable to this proceeding as the Board did make findings on which to base either order.

c. Petitioner's representation (Motion, p. 5) that Mr. Brinkley's affidavit was "based on the assumption that the exclusive patronage contract rate system would not be allowed to apply to f.o.b. or f.a.s. shipments," may be correct but if correct it can only be concluded that he had not read the report issued prior to his affidavit. It was incumbent upon affiant to appraise himself of the contents

of the Board's report before he executed his affidavit. If this were done he would have no doubt that all f.o.b., f.a.s. shipments were *not* excepted from Board approval of the contract-rate system. Even a most cursory reading of pages 46 and 47 of the report set out above indicates that f.o.b., f.a.s. shipments under certain circumstances may be included under the contract.

d. In paragraph 1(K) petitioner has expressed the belief that the clarifying order of January 10, 1956, "was prompted by certain ex parte representations and arguments made by the Conference in private conferences and conversations with the Board." This belief is false. The short and simple answer is that Conference representatives at no time conferred with the Board individually or collectively on the matter. We would consider it unnecessary and undignified to pursue the matter further but because of the persistent aspersions cast on the Board by this petitioner we set forth the facts in detail:

After the issuance of the Board's original order and at the time when the General Counsel and his legal staff were making preparations to oppose petitioner's application for a preliminary injunction, filed in this Court, the question arose as to what extent the approval of the contract-rate system pertained to f.o.b., f.a.s. shipments. The Board's report was compared with its order by the General Counsel's legal staff, and it was their tentative view that possibly the order needed clarifying. This view was discussed with the Assistant General Counsel and later with the General Counsel. The date was approximately December 22, 1955. No agreement was then reached as to the need for or method of clarifying the order, although various proposals were made and considered.

In the middle of the following week, Mr. Elkan Turk, Jr., one of the counsel for the Conference, telephoned the General Counsel to comment on whether a memorandum had been filed by the General Counsel for the Board in opposition to petitioner's motion for preliminary injunc-

tion. The General Counsel, during this conversation, related to him that there were some members of his staff that felt there was some possible uncertainty as between the order and the Board's report insofar as f.o.b., f.a.s. shipments were concerned. Mr. Turk, Jr. advised that his father was out of town.

Two or three days later, Mr. Turk, Sr. called to discuss the matter. In the meantime, the legal staff of the General Counsel had not arrived at a determination on whether the order need be clarified, and if so what, if any, clarifications to recommend to the Board. These deliberations were impeded, because a member of the legal staff most familiar with the problem was out ill. Because it was the contract of the Conference which was being restrictively modified by the Board's order, the General Counsel asked for and received suggestions from Mr. Turk.

On the return of the ill member to the staff, a form of clarifying order was adopted for presentation to the Board. Not one of the suggestions made by Mr. Turk was included in the staff's recommended clarification, nor were they transmitted to the Board.

The General Counsel then discussed this matter informally with the Chairman of the Board, who made a minor change in the recommendation, and on the same day, January 10, 1956, this matter was brought before the Board, it being stated by the General Counsel that there was some doubt whether the former order fully explained or conformed to the Board's report. On the recommendation of the General Counsel, the Board adopted the clarifying order.

At no time did a representative of the Conference speak to or communicate with the Board concerning the clarification of the order. The only contract by the conference in this matter was between the Conference and the General Counsel, and the Conference suggestions were all rejected by the General Counsel and never submitted to the Board.